Warwick Studies in Industrial Relations

General Editors: G.S. Bain and H.A. Clegg

Also in this series

The Changing Contours of British Industrial Relations
William Brown (ed.)

Strikes in the United States 1881–1974
P.K. Edwards

The Measurement of Unemployment
W.R. Garside

Profiles of Union Growth
George Sayers Bain and Robert Price

The Social Organization of Strikes
Eric Batstone, Ian Boraston, and Stephen Frenkel

Labour Shortage and Economic Analysis
Barry Thomas and David Deaton

Shop Stewards in Action
Eric Batstone, Ian Boraston, and Stephen Frenkel

British Employment Statistics
N.K. Buxton and D.I. MacKay

Trade Unionism under Collective Bargaining
Hugh Armstrong Clegg

Union Growth and the Business Cycle
George Sayers Bain and Farouk Elsheikh

Social Values and Industrial Relations
Richard Hyman and Ian Brough

Industrial Relations in Fleet Street
Keith Sisson

Industrial Relations and the Limits of Law
Brian Weekes, Michael Mellish, Linda Dickens, John Lloyd

Labour Law and Politics in the Weimar Republic

OTTO KAHN-FREUND

Edited, with an Introduction and Appendices, by
ROY LEWIS
Senior Research Fellow,
SSRC Industrial Relations Research Unit,
University of Warwick
JON CLARK
Lecturer in Industrial Relations,
Department of Sociology and Social Administration,
University of Southampton
Translated by JON CLARK

BASIL BLACKWELL · OXFORD

To Elisabeth Kahn-Freund

First published in 1981 by
Basil Blackwell Publisher
108 Cowley Road
Oxford OX4 1JF
England

British Library Cataloguing in Publication Data

Kahn-Freund, Otto
Labour law and politics in the Weimar Republic. – (Warwick studies in industrial relations)
1. Industrial relations – Germany – History – 1918–1933
I. Title II. Lewis, Roy, *1913–*
III. Clark, Jon IV. Series
943.08'5 DD453

ISBN 0-631-12825-5

Typeset by MHL Typesetting Ltd, Coventry
Printed in Great Britain by
The Blackwell Press Ltd, Worcester

Contents

Editors' Foreword

The University of Warwick is the major centre in the United Kingdom for the study of industrial relations. Its first undergraduates were admitted in 1965. The teaching of industrial relations began a year later in the School of Industrial and Business Studies, and it now has one of the country's largest graduate programmes in this subject. Warwick became a national centre for research into industrial relations in 1970 when the Social Science Research Council, a publicly-funded body, located its Industrial Relations Research Unit at the University. The Unit has a full-time staff of about twenty and undertakes research into a wide range of topics in industrial relations.

The series of Warwick Studies in Industrial Relations was launched in 1972 as the main vehicle for the publication of the results of the Unit's projects. It is also intended to disseminate the research carried out by staff teaching industrial relations in the University, and the work of graduate students. The first six titles in the series were published by Heinemann Educational Books of London, and subsequent titles have been published by Basil Blackwell of Oxford.

The present volume presents for the first time in English translation a selection of the German writings of the late Professor Sir Otto Kahn-Freund. He was the leading scholar of British and comparative labour law and his influence on both the academic study and legislative development of this subject was profound. Yet his basic conceptual framework was derived, as he always acknowledged, from the cultural and political milieu of Weimar Germany. These writings amply demonstrate that when Kahn-Freund arrived in Britain in 1933 he was already a brilliant technician and theoretician of labour law. They provide a fascinating insight into the labour law and politics of the Weimar Republic and also into the wider theoretical and comparative analysis of the role of labour law and labour movements in capitalist societies. In Kahn-Freund's own postscript in this book, recorded during his last days, he reflects on his

Weimar experience and on those wider issues of labour law, politics, and the nature of the state.

The translations are preceded by a substantial editorial introduction written by Roy Lewis, a Senior Research Fellow in the Industrial Relations Research Unit, and Jon Clark, a Lecturer in Industrial Relations at Southampton University. They outline the political and economic background of the development of trade unions, industrial relations, and labour law in Germany. They give, too, a critical assessment of Kahn-Freund's translated writings and discuss the influence of the Weimar legacy on Kahn-Freund's later analyses of labour law. This volume, completed while Roy Lewis was a member of the Department of Industrial Relations at the London School of Economics and Political Science, is the forerunner to a further and more comprehensive study of Kahn-Freund's work on which he is currently engaged in the Unit.

George Bain
Hugh Clegg

Preface

We have produced this book in the belief that there is likely to be a keen contemporary interest in the society and politics of Weimar Germany (1919–33), and that students of labour law, industrial relations and social policy will be surprised and perhaps fascinated to discover how the 'Weimar legacy' shaped the analysis and ideology of Britain's and Europe's most influential labour lawyer, Otto Kahn-Freund. Weimar studies, cultural as well as political, are in vogue. In spite of numerous contrasts and differences, many of the symptoms of the Weimar tragedy now seem only too familiar. Against a backcloth of increasingly serious international tensions, a new generation is experiencing unemployment, inflation, fluctuating living standards, and the scapegoating of minorities and trade unions. In Britain, in particular, one of the most significant expressions of the breakdown in the 'post-war consensus' since the mid-1960s has been the overt politicisation of labour law, which has become the focus for a number of bitter and divisive conflicts. A knowledge of the social and political controversies of the Weimar era, which are reflected and discussed in Kahn-Freund's writings, may therefore be of more than purely historical interest.

At first sight it may seem strange that two British industrial relations academics should be responsible for introducing, editing and, in the case of Jon Clark, translating a volume of German writings about labour law and politics in the Weimar Republic. Perhaps, therefore, we should explain the origins of this book. In 1978 Roy Lewis, then a specialist in industrial relations law at the London School of Economics, began a systematic study of Kahn-Freund's English writings on labour law, but soon discovered that they were decisively influenced by concepts and theories which had their roots in the culture and society of Weimar Germany. This realisation was overwhelmingly confirmed on reading in an English translation made by Jon Clark certain key passages from Kahn-Freund's early writings. After taking an undergraduate degree in German Jon Clark wrote his doctoral thesis on the socialist theatre of

the Weimar Republic and was employed in 1976–77 at the LSE on a research project comparing the British TUC with its West German counterpart, the DGB. It was during these two years that we first co-operated together on two publications related to the Bullock Report on Industrial Democracy (as co-authors of 'The Bullock Report', *Modern Law Review*, 40 (1977) 323, and as editors of *Ford Shop Stewards on Industrial Democracy*, Institute for Workers' Control, 1977). During 1978 it became increasingly clear to both of us that Kahn-Freund's German background was of immense significance for his later contributions to British and comparative labour law, and we therefore decided to prepare this edition of his German writings. After a certain amount of friendly persuasion Jon Clark agreed to undertake the translation, even though the task had to be completed during his first years as a lecturer at Southampton University. The introduction to this volume is an authentic piece of joint writing, in which we have sought to combine our respective specialisations in order to explain the context, intrinsic value and permanent legacy of the translated works.

Our project could not have reached fruition without the constant encouragement and invaluable advice of Otto Kahn-Freund, who had moreover intended to write an autobiographical postscript to this volume. After his sudden death on 16 August 1979 we continued to receive unstinting support from his wife, Lady Elisabeth Kahn-Freund. She has kindly given us permission to reproduce an edited version of a recorded interview with Kahn-Freund and one of his letters to us, so that the reader may still have his fascinating comments on the Weimar period fifty years on. Since this material assumes a knowledge of the period and the subject, it is placed after the translated writings.

We would like to express out thanks to Professor Dr Wolfgang Däubler (University of Bremen) and Professor Dr Spiros Simitis (University of Frankfurt) for their detailed critical comments on the first draft of the introduction, and to Jenny Pardington for her understanding and practical assistance throughout the course of this project. We are also indebted to the Anglo–German Foundation for the Study of Industrial Society and to the LSE Publications Committee for their financial and moral support in the preparation of this volume.

Roy Lewis and Jon Clark

Part I

1

Introduction

Otto Kahn-Freund: An Outline of His Biographical Development

Professor Sir Otto Kahn-Freund (1900–79) was a legendary figure in the world of legal scholarship.[1] He made outstanding contributions to a wide range of subjects – comparative law, conflict of laws, family law and, above all, labour law. He was the doyen of British labour lawyers, a position which was publicly recognised in 1965 with his appointment to the Donovan Royal Commission on Trade Unions and Employers' Associations.[2] His name was closely linked with the London School of Economics, where he was a member of the Law Department from 1936 until 1964 (as professsor from 1951), and the University of Oxford, where he was Professor of Comparative Law from 1964 to 1971. But his intellectual and spiritual roots went back to the cultural and political milieu of Weimar Germany.

Kahn-Freund was born in Frankfurt-am-Main on 17 November 1900. His family background was Jewish (though not practising), financially comfortable and highly cultured. His father owned a factory, but from the age of fifty devoted himself almost exclusively to social work and music. This environment exerted a lasting influence on the young Otto Kahn-Freund, but he also developed a precocious interest in politics, as did many of his generation and background. While still a schoolboy he identified himself with the unpopular cause of pacifism, a view which he continued to hold when conscripted into the Kaiser's army at the end of the First World War. During the turbulent years following the end of the war, he became a socialist, joining the Social Democratic Party on 1 April 1922 while still a student.

He studied history and then law at the universities of Heidelberg, Leipzig and Frankfurt-am-Main, and it was in Frankfurt that he was first attracted to the study of conflict of laws and comparative law, subjects which were taught there by Professor Hans Lewald. But the dominant

influence on his intellectual and political development at this time was Professor Hugo Sinzheimer, the leading social democratic labour lawyer who will feature largely in the following pages (Kahn-Freund's introduction to a collection of Sinzheimer's essays and speeches is in fact the first of the translated writings).[3] Under Sinzheimer's supervision, Kahn-Freund wrote his thesis on the reinstatement clause and the normative effect of collective agreements, for which he received his Doctorate of Laws in 1925.[4] After a period as Sinzheimer's assistant, he rounded off his education by spending a year in the USA and Britain.

In the USA Kahn-Freund made contact with his uncle, Professor Ernst Freund, a scholar pre-eminent in the fields of American administrative law and legislation, a proponent and draftsman of progressive legislation on family law, workmen's compensation and industrial health and safety, and an active campaigner against the manifest injustices of the Sacco and Vanzetti case.[5] Freund's passion for social justice, which he attributed in part to his Jewish background,[6] and his path-finding work in what would now be called 'socio-legal studies', provided an inspirational example for his young nephew. Seen retrospectively, Kahn-Freund's short stay in Britain also had a formative effect on his later life and work, although the full import of the largely 'autonomous' development of labour relations in this country (where the trade union movement had grown without the support of positive legal rights granted by the state) only came home to him after his emigration to England in 1933 (see his Postscript to this volume). While in London, he attended lectures at the LSE, including W.A. Robson's course in labour law, which was at the time a unique phenomenon in British universities.[7]

After his return to Germany in 1928 Kahn-Freund entered the state judicial service. Georg Flatow, a socialist labour lawyer and senior civil servant, ensured that Kahn-Freund had the official backing of the SPD and the socialist trade unions for his appointment from January 1929 as one of the junior judges in the Berlin labour tribunal. He soon acquired a reputation for juridical skill and, almost inevitably, for his progressive leanings. It was no coincidence that his closest friends and colleagues were two outstanding young social democratic labour lawyers and fellow ex-Sinzheimer pupils – Ernst Fraenkel and Franz Neumann.[8] Kahn-Freund, Fraenkel and Neumann were all socialist intellectuals from middle-class Jewish families (as were Sinzheimer and Flatow), and together they formed something of an identifiable circle. The circle was in fact social as well as intellectual, and the female members were just as closely involved as the male. In 1931 Kahn-Freund married Elisabeth Klaiss, then in her mid-twenties. She came from a working-class back-

ground and, having become active in the socialist youth and students' movement, she moved to Berlin, where she met her future husband at a party given by Georg Flatow.

Whilst Fraenkel and Neumann were engaged as advocates in many of the legal battles of the late Weimar period and Kahn-Freund administered justice in the Berlin labour tribunal, each one of them began to elaborate his own variant of a critical theory of Weimar labour law. Fraenkel and Neumann, who both subsequently became distinguished political scientists, published incisive theoretical critiques.[9] Kahn-Freund's major attempt 'to determine the intellectual and political position of German labour law',[10] as Professor Ramm described it many years later, was contained in a short monograph, *The Social Ideal of the Reich Labour Court*[11] (1931), and a learned article entitled 'The Changing Function of Labour Law'[12] (1932). Both texts have been translated into English for the first time for publication in this volume.

On 30 January 1933 Hitler seized power:Weimar democracy was in ruins. Shortly afterwards, it fell to Kahn-Freund to decide on an appeal against dismissal by three radio technicians, who had been sacked early in February for allegedly conspiring to sabotage Hitler's broadcast to the nation from the 'Palace of Sport' in Berlin. Kahn-Freund was the only judge willing to hear the case, and his technically correct and, under the circumstances, extremely courageous judgment[13] in favour of the technicians (who had been accused of being Communist supporters) certainly sealed his fate. Interrogation and surveillance by the Gestapo and his own (illegal) dismissal swiftly followed; Otto and Elisabeth Kahn-Freund fled Germany to England in June 1933.

In approaching Kahn-Freund's German writings, we enter a different time and a different world. His critique of the relationship between labour law and politics is located in a specific historical context. It is not possible to understand his rigorous technical, sociological and ideological analysis without an appreciation of a number of inter-related contextual themes: the economic and political history of the period, the development of the trade union movement and industrial relations, and the elaboration of a complex system of employment legislation and labour law. Our introduction attempts to cover this ground in order to set the scene for the translated writings, which we shall introduce and assess. We conclude with an evaluation of the significance of the 'Weimar legacy' for Kahn-Freund's subsequent contributions to the theory and practice of labour law.

The historical introduction begins with the 'November Revolution' of 1918 and the founding of the Weimar Republic which heralded the

establishment of political democracy and the recognition of the trade unions by the employers and the state. The new democratic order was from the beginning weak and unstable, and provoked the powerful hostility of the middle and upper classes, who longed for a return to the old Imperial system of the pre-1914 *Reich*. The strongest support for the Republic came from the representative organisations of the industrial working class, the Social Democratic Party (SPD) and the socialist trade unions. Both party and unions, however, were weakened and demoralised by events which we shall describe in more detail below. In essence, the militancy of the workers' councils movement, the formation of a left-wing breakaway (the USPD) from the 'majority' Social Democratic Party and the rise and unpredictable tactics of the Communist Party drove the SPD into a series of defensive and pragmatic alliances with the 'bourgeois' parties and even with the military, who were always eager to intervene to suppress the activities of the labour movement. Successive economic and political crises subdued what remained of the SPD's fighting spirit, notwithstanding its continued electoral support among the manual working class. Between 1930 and 1932 the forces of social democracy provided only weak resistance to the policies of a succession of authoritarian governments, and, in the end, failed to defend Weimar democracy against Hitler fascism.

Similar pressures constrained the policies and behaviour of the socialist trade unions, who also suffered from the existence of rival Catholic and 'liberal' organisations. In addition, white-collar workers and civil servants joined separate unions, which helped to promote and sustain a consciousness of a distinct and superior status. This social and ideological differentiation was clearly reflected in the structure of German employment law and eventually provided one of the springboards for fascism. The trade unions suffered from a further disability, of which Kahn-Freund and other critics were acutely aware, but which was denied or suppressed by most union leaders: an excessive and self-defeating reliance on state support and law. We shall have to trace how and why the German trade unions, who before 1914 had always advocated a self-regulated and self-administered system of collective bargaining and dispute settlement in the hope of escaping from the 'class justice' of the courts, came to modify their previous reliance on their own industrial strength in favour of a comprehensive system of labour law. A battery of statutes, decrees and regulations (which we shall examine in some detail) was interpreted by the judges as a substitute for industrial conflict. In the key areas of arbitration, collective agreements and works councils, the state – and in particular the judiciary – transformed trade union legal rights into legal limitations, and so struck

another blow at a movement already weakened by economic crises, occupational and ideological divisions and the generally hostile attitude of the employers. On top of this the reliance on labour law and social policy was an important factor in destroying the will of the unions to take independent action in order to protect their members and, ultimately, to defend themselves against the rise of fascism.

Historically, the relation between labour law and politics provided a focus for many of the most important social conflicts of the Weimar Republic. Theoretically, the relation between labour law and the state has been the subject of continuing interest to academics and practitioners attempting to understand the development of trade unions and industrial relations in twentieth century capitalist societies. In this introduction, therefore, we aim to provide the reader with an analysis of the social and political background to Otto Kahn-Freund's writings on Weimar labour law, in order, ultimately, to establish the immense theoretical and historical importance of the 'Weimar legacy' for his seminal contribution to the study and practice of labour law in Britain and Europe after 1945.

The Political and Economic History of the Weimar Republic

The Background to the November Revolution of 1918

On 9 November 1918 Kaiser Wilhelm II abdicated as Emperor of Germany, the Imperial Chancellor (Prince Max von Baden) resigned his post, and Philipp Scheidemann, a leading figure in the Social Democratic Party, proclaimed the 'Free German Republic' from the steps of the *Reichstag* in Berlin. On the next day, as Arthur Rosenburg recounted:

> the first Republican Government of Germany was elected at a general meeting in the Busch Circus of the Berlin Workers' and Soldiers' Councils. In taking this decision the Berlin Workers' and Soldiers' Councils were acting as the representatives of all revolutionary workmen and soldiers in the German *Reich*. No single voice was raised throughout the *Reich* in opposition to their decision. Thus Germany accepted its new Government composed of six representatives of the people.[14]

These events marked the end of Imperial rule and the beginnings of a republican system of government in Germany. Less than fifteen years later, the Weimar Republic, its democratic constitution and its pioneering achievements in the fields of social policy and labour law lay in ruins, finally destroyed by the Nazi seizure of power.

The underlying causes of the events surrounding the 'November Revolution' of 1918 can be traced back to the tensions which had developed in German society between 1850 and 1914. In 1850 Germany had still been mainly an agricultural country, divided into a number of largely autonomous states; by 1914 it was a unified federal state and the second largest industrial and trading power in the world. However, this major social transformation had not come about as a result of the seizure of political power by the now economically dominant industrial and financial elites, nor had it been accompanied by a gradual democratisation of political life. The 'unification' of Germany in 1871 had been imposed from above by military power, and Germany was ruled from 1871 until 1918 by the Emperor of Prussia and Germany, backed by the Prussian army and landowners. Under the 1871 constitution, it is true, a two-chamber system of constitutional government had been established, composed of a Federal Council made up of representatives of the governments of the 25 federal states, and a legislative assembly (*Reichstag*) elected by universal suffrage of males over the age of 25. But the Federal Chancellor of Germany, who appointed the Cabinet, was himself appointed by the Emperor (*Kaiser*), military and foreign policy were excluded from the *Reichstag's* sphere of influence, and constituency boundaries were drawn to ensure that the more conservative rural areas were disproportionately represented.[15] As Otto Kahn-Freund later pointed out, this dominance of rural landowners over the new class of industrialists was one of the main factors which contributed to the fragmentation of employment law in Germany before 1914.[16] The political domination of Imperial Prussia also meant that the SPD, by 1912 the largest party in the *Reichstag*, was still systematically excluded from any access to the formation of state policy. Against this background it is easy to see that, though the SPD retained a theoretical commitment to the revolutionary overthrow of capitalism, its more pragmatic and immediate objective before 1914 was to establish a full parliamentary democracy based on universal suffrage and popular sovereignty.

It was the traumatic events of the First World War which provided the catalyst for the social and political upheavals which shook Germany in 1918 and 1919. The defeat of the German armed forces was not just a defeat for the Supreme High Command: it discredited the whole Imperial system on which Germany's expansionist and militarist policy had been based.[17] By the Autumn of 1918 the demise of this system was inevitable. It was not clear, however, which system would take its place.

When the military relinquished its overall control in October 1918

the new interim coalition government proved completely powerless in the face of events which were taking place outside parliament in the navy, the army and the factories. Signs of unrest had been growing in the navy since the middle of 1917, and sailors on a number of ships had established representative councils to express their grievances on issues ranging from working conditions and the allocation of food to the conduct of the war. Similar issues became the focus for widespread industrial action by workers in the large munitions factories, but since the unions had declared a voluntary moratorium on strikes in support of the war effort, it was left to elected delegates from the workplaces to organise and lead the action. At the end of January 1918, 400 delegates from most large factories in Berlin met to draw up a programme of demands and a plan of action. Thus was born the Berlin 'Workers' Council' (*Arbeiterrat*), the first of many formed in the following months.[18] When these workers' councils joined together with sailors' and soldiers' councils in a number of cities in November 1918, following the refusal of the sailors to mount a final offensive against the British fleet, the pressure for radical political change was irresistible. It was under this pressure also that leaders of the employers and the trade unions met on 15 November 1918 and agreed to establish a 'collectivist'[19] system of labour relations in Germany, in which independent trade unions would be given full recognition.

The Councils' Movement and the Establishment of the Weimar Republic: 1918–19

In the months following the November Revolution, the future of Germany lay to a large extent in the hands of the political and industrial organisations of the labour movement. In this period the traditional organisations of German labour, the SPD and the trade unions, pursued two main objectives: the establishment of a system of parliamentary government (the transition from an 'authoritarian state' to a 'people's state') and the constitutional and legislative recognition of new rights for working people in the field of economic and social policy. This strategy was threatened, however, by the continued existence of the independent workers' and soldiers' councils and by the more radical programmes of newly founded political parties on the left. Although most of the demands of the councils were in line with the policy of the SPD, their unorthodox extra-parliamentary methods and organisation challenged the legalistic and evolutionary approach of the party and union hierarchy. Moreover, some of the most powerful councils, particularly the Berlin Workers' and Soldiers' Council, were coming increasingly under the influence of the Independent Social Democratic

Party, the USPD. (This party had been founded in 1917 by former members of the SPD who had been fundamentally opposed to the government's conduct of the war and were also critical of the SPD's general lack of political radicalism.) The USPD, the Berlin Workers' and Soldiers' Council and later the Communist Party (the KPD was founded in December 1918) regarded the councils (*Räte*) as the organisations which, like their Russian counterparts, the soviets, would bring about the transition to a socialist society. On the other hand, SPD and union leaders believed that the councils would eventually be superseded in the political sphere by a constitutionally elected parliament, and in the industrial sphere by the official trade unions. It took six months of violent conflict and virtual civil war before the future of the councils' movement was finally decided.

From November 1918 until February 1919 Germany was governed by the so-called 'Council of People's Representatives', which had been elected on 10 November at a meeting of workers and soldiers in Berlin and was composed of three SPD and three USPD members. The conflict between the SPD and the USPD, which had been only temporarily resolved by the establishment of the six-man Council, soon flared up under the pressure of events over which neither party had any real control. It started in Berlin in December 1918 with a series of confrontations between groups of workers and soldiers on the one hand and the army and para-military groups acting on behalf of the government on the other.[20] As a result of these incidents the three USPD 'People's Representatives' resigned in protest at what they saw as the complicity between the SPD and the army, thus leaving the government effectively in the hands of the SPD alone. After more than a week of bitter and bloody street battles in Berlin at the beginning of January 1919 the extreme left-wing of the councils' movement was almost completely destroyed, and the leaders of the newly formed Communist Party, Karl Liebknecht and Rosa Luxemburg, were dead, murdered by right-wing para-military forces.

Immediately after these events, on 19 January 1919, elections were held and the SPD and the USPD won over 45 per cent of the seats in the new National Assembly.[21] However, the USPD refused to form a coalition government with the social democrats unless the SPD leadership was prepared to distance itself from its 'present tyranny' and provide 'practical proof' of its intention to 'secure the democratic and socialist achievements of the Revolution'.[22] The SPD responded by entering discussions with the two main liberal-democratic parties, the Centre Party and the German Democratic Party, and within a short space of time a 'republican coalition' government was formed. Its

immediate task was to present a draft of a new *Reich* Constitution to the National Assembly; Professor Hugo Preuss, a liberal constitutional lawyer, was already working on a first draft on behalf of the Council of People's Representatives. It was clear from the outset that one of the most controversial issues would be the future role of the workers' councils in the economic and political life of Germany.

The new cabinet under Philipp Scheidemann (SPD) announced that it had no intention of giving the councils any formal recognition in the constitution:[23] Hugo Preuss also failed to make any reference to them in the first draft he submitted to the government. This approach was immediately attacked both inside and outside the ranks of the SPD. Some members of the SPD advocated the institutionalisation of the councils in the form of local, regional and national 'chambers of labour' (*Arbeiterkammern*), which would act as economic parliaments (representing the 'producers') and advisers to the government on economic and social policy. The USPD, meanwhile, continued to campaign for the recognition of the councils as the organs of 'socialisation' (*Sozialisierung*), as the pivotal economic and political organisations in the transition to a socialist society. Eventually, after a series of mass strikes and demonstrations in February and March 1919, the SPD was forced to change its policy, and at the end of March it published a new statement promising the formal recognition of the councils in the constitution.[24] The new policy was subsequently argued before the Constitutional Committee of the National Assembly on 2 June 1919 by Professor Hugo Sinzheimer.[25] By this time, however, the 'political' power of the councils in the Ruhr, Saxony, Thuringia, Berlin and Münich had been broken by government troops acting on the orders of the SPD-led coalition.[26]

The eventual system of government established under the Weimar Constitution of August 1919 was, as Franz Neumann later pointed out, 'a codification of agreements already made among different socio-political groupings, each of which had demanded and received some measure of recognition for its special interests'.[27] Parliament was to be sovereign, but its power was open to modification and supervision by a series of institutions and procedures, including a popularly elected *Reich* President, plebiscites, and so-called 'economic councils' (*Wirtschaftsräte*), composed of employer and employee representatives and 'other participant groups of the population' (Article 165 of the Weimar Constitution). Under a secret agreement of 10 November 1918, SPD-leader Friedrich Ebert had reached an understanding with army leaders about their future role, and on 15 November employer and trade union representatives had come to a basic accommodation about the future conduct of

industrial relations. In a series of written and unwritten agreements between the parties of the first republican coalition government, the relation between the national government and the various constituent states (*Länder*) was fixed (the adoption of the federal principle meant that Prussia remained by far the largest and most powerful state), and the existing status of the judiciary and the civil service was safeguarded. The *Reich* Election Law of 1920 established a system of proportional representation, which virtually guaranteed that the Republic would be ruled permanently by coalition governments.

The Weimar state was, then, on Neumann's analysis, an uneasy compromise between three distinct elements: the heritage of the past (the civil service, the judiciary and the army); parliamentary democracy (a modification of the British and North American systems); and 'pluralistic collectivism'[28] (a conscious attempt to give constitutional recognition to powerful social and economic organisations such as the trade unions and the workers' councils as a major force alongside the state). In its very conception, therefore, the Weimar Republic was a transitional order, a compromise between various forces and ideologies, capable of modification and development in a number of different directions. This compromise was to determine the character of the entire system of Weimar labour law and industrial relations. In 1919, however, no one could have foreseen the changes which were to occur in the Republic during the 14 years of its unstable and stormy existence, or the way in which labour law was to undergo a fundamental transformation.

The Post-War Revolutionary Crisis: 1920–3

The years of permanent social and political instability in Germany following the November Revolution have often been characterised as the period of 'post-war revolutionary crisis'.[29] Between February 1919 and December 1923 there were ten different coalition governments (the Centre Party and the Democratic Party participated in all of them, the SPD in all but three) and a series of attempted political coups in various parts of the country. In January 1923 French forces occupied the Ruhr, and, at the height of the inflation in December of the same year, money wages reached one thousand million times the pre-war level. But until the winter of 1922–3, the crisis was political rather than economic, indeed, until then, manufacturing industry had been working at nearly full capacity, unemployment was low, and trade union organisation and collective bargaining flourished.

The political crisis of the immediate post-war years reached its first climax in the Kapp Putsch of 1920, which was to prove 'the zenith of

the unions' political power in the Weimar period'.[30] On 13 March two right-wing leaders, Wolfgang Kapp and General von Lüttwitz, marched on Berlin at the head of a para-military force to overthrow the republican government. When the army declared its neutrality, SPD leaders turned for support to the trade union movement, calling for a general strike before fleeing from Berlin. In total constrast with their 'non-political' and constitutionalist tradition, the leaders of the main socialist trade union confederation, the ADGB, responded by calling a political general strike in support of the government and the Republic. In a few days the coup was defeated, but union leaders refused to call off the strike until a nine-point programme of demands was fulfilled.

If the programme had been carried out, it would undoubtedly have 'effected near revolutionary changes in German government and society'.[31] It included demands for decisive union influence on the formation of national and regional state governments and on new legislation (clearly an 'unconstitutional' demand), a purge and democratisation of the civil service, an immediate extension of statutory measures to guarantee social and economic equality for all employees, the socialisation of key industries (promised, but not implemented by the SPD), and the takeover of the security forces by the organised labour movement.[32] Leaders of the socialist trade unions and the USPD-led Berlin Workers' Commission (which was the successor of the Berlin Workers' Council of 1918–19) met the government to negotiate on these demands, and at one point the ADGB called for the formation of a 'workers' government' composed of ADGB, SPD and USPD representatives with tacit KPD support. But, in finality, the three main parties of the labour movement were unable to bury their differences, and by the end of March a new republican coalition was in control. In a bloody aftermath hundreds of workers in the Ruhr who refused to call off the strike were shot by government troops and many more were imprisoned. The Kapp Putsch, nonetheless, 'marked the pinnacle of trade-union power in German politics ... Never again did the unions wield such influence in German politics.'[33]

After these events the tension between the various factions inside the USPD intensified. In October 1920 a large number of delegates at its national conference were expelled when they voted to affiliate to the Soviet-dominated 3rd International, and about 300,000 USPD members transferred their allegiance to the Communist Party. In the Autumn of 1922, the 'rump-USPD' decided to rejoin the 'majority' SPD; the overriding need at that time was to present a united front in the defence of the Republic after the assassination of Walther Rathenau in June 1922. Rathenau was the most prominent 'bourgeois' politician

identified with the Weimar Republic, and just one in a long line of republican leaders assassinated in this period. His murder was of great political significance, however, because, as a Jew and as the main signatory of the Russo-German Rapallo Treaty (1922), he seemed to personify the anti-republican myth that the Weimar system was established and sustained by a 'bolshevik' and 'Jewish' conspiracy. Yet all these events were overshadowed by the political and economic crisis of 1923 which brought Germany once again to the brink of revolution.

In January 1923, the French government occupied the industrial heartland of Germany, the Ruhr, in order to confiscate the coal it claimed as part of its reparation payments. But it was the collapse of the German mark in August, following months of currency speculation, that finally precipitated the unprecedented inflationary crisis in which large numbers of people lost their savings and many small businesses were bankrupted. By the autumn, unemployment reached 23.6% and over a quarter of those workers who still had jobs were on short time. In September 1923 President Friedrich Ebert declared a state of emergency under Article 48 of the Weimar Constitution,[34] and in October the *Reichstag* passed an Enabling Act which allowed the Chancellor (Stresemann) to govern by emergency decree. The army was then sent into Middle Germany to dissolve the legally constituted 'workers' governments' (coalitions of social democrats and communists) in Saxony and Thuringia, and on 8 November Adolf Hitler staged an unsuccessful coup in Münich.

The crisis of 1923 revealed the fragility of the entire 'collectivist' system of labour law and industrial relations in the Weimar Republic. A new government under Wilhelm Marx (Centre Party), which came into power in November 1923, introduced a series of emergency measures which within six months reversed many of the achievements of the November Revolution. Wages and civil service salaries were reduced, the eight-hour-day was to all intents and purposes abolished, cuts were made in welfare payments to the unemployed and to workers on short time, while taxes, rents and deductions from wages were all raised. The Communist Party was banned. By the middle of 1924 Germany was able, with much financial and diplomatic help from the USA and Britain, to enter a phase of relative economic and political stability.

Relative Stability and the Onset of Economic Crisis: 1924–9

'Rationalisation' was the key-word in the vocabulary of German politicians, industrialists and trade union leaders alike in the mid-1920s. This was a period of fascination with the American way of life, with modernity and technological progress, a period in which many artists

preached the gospel of 'new objectivity' and Henry Ford was the new messiah.[35]

The process of concentration and centralisation of private industry, which had already been accelerated by the inflation of 1922–3, was given a further boost by the massive loans and credits made to German manufacturers by foreign governments and financiers. Large trusts were formed over wide areas of industry (most notably in steel and chemicals), labour productivity in manufacturing rose sharply, industrial production doubled in five years, and there was a general rise in real wages.[36] In this climate of economic expansion several important social policy measures affecting employment relations (for example, laws on labour tribunals, unemployment insurance and employment exchanges) were passed by centre-right coalition governments with the support of the SPD. In retrospect, it is easy to see that this period of relative economic stability was both artificial and fragile. At the time, however, it seemed as though prosperity had finally come to Germany and economic crises were a thing of the past.

Perhaps the most significant index of Germany's underlying economic problems in these years was the permanently high level of unemployment. Industrial rationalisation incontestably improved the efficiency of large manufacturing companies, but it also led to major job losses and the creation of structural unemployment: even at the height of the boom in 1927 and 1928, unemployment never fell below 8%. This put increasing pressure on the state insurance scheme, which had been created to provide for no more than a maximum of 1.1 million registered unemployed workers. More significantly, the political and social consequences of unemployment were to become a decisive element in the weakening of independent trade union action and the undermining of democracy between 1929 and 1932.

Before these turbulent events, however, there was one further period of republican coalition government in which the SPD again played a major role. In fact, after over four years in opposition, the SPD entered the election campaign of May 1928 with a vigour and a militancy which it had not shown since the founding of the Weimar Republic. It mounted a powerful and imaginative attack against the policies of the so-called 'bourgeois-block' (centre-right) coalition governments, and emerged with nearly 30% of the vote, the highest it had achieved since February 1919. The Communist Party polled over 10% which meant that the political parties of the labour movement had together won over 40% of the total vote. Nevertheless, in June 1928, SPD leaders once again formed a coalition government with their republican allies, including this time leaders of the more right-wing German People's Party and the

Bavarian People's Party; Hermann Müller (SPD) became the new Chancellor. Although his government lasted 21 months, the longest in the history of the Weimar Republic, it was beset by fundamental internal divisions. These came to a head in the autumn of 1929 when the Wall Street Crash destroyed the artificial stability of an economy already in the throes of a cyclical recession. From then on, the social democrats came under intense pressure to agree to radical deflationary measures and to cut state spending. Eventually SPD Ministers resigned from the government in March 1930 when, after strong trade union pressure, the SPD parliamentary group refused to agree to a new scheme of financing and administering unemployment insurance. It was perhaps symbolic of the importance that German trade union and labour leaders attached to social policy that the last SPD-led coalition of the Weimar Republic was dissolved over the issue of social insurance and welfare benefits.

On the resignation of the SPD Ministers Heinrich Brüning (Centre Party) was appointed Chancellor, and he soon put before the *Reichstag* a programme of stringent social policy measures. When the *Reichstag* voted against these policies, Brüning took a presidential decree out of his pocket and announced the dissolution of parliament. This proved to be the beginning of the end of Weimar democracy and, with it, the end of the whole system of trade union and employment rights which had been won during the November Revolution.

From Economic Crisis to Fascist Dictatorship: 1930–3

The National Socialists gained only 0.8 million votes (2.6%) in the national election of May 1928; in September 1930, however, they captured 6.4 million (18.3%), and in July 1932 13.8 million (37.3%) to become the largest party in the *Reichstag*.[37] The ideological and mass-psychological basis for this development cannot be analysed in detail here.[38] What is significant in the context of this study is that, prior to their seizure of power in 1933, the Nazis won little support from the manual working class, which had traditionally provided the backbone of the trade union and labour movement. In fact, from September 1930 until November 1932, the total vote of the SPD and the KPD in the three *Reichstag* elections remained constant at around 13 million votes (37%).[39] The Nazi Party derived its increasing support mainly from those 'middle strata' of society who were traditionally hostile to the 'collectivist' principles of the labour movement and yet who faced 'proletarianisation' as a consequence of the economic crisis: small-holders in agriculture, small businessmen in handicrafts, manufacture and retailing, salaried employees in clerical and administrative occupations, civil servants and the intelligentsia. Despite the growing

numerical importance of these middle strata in the occupational structure, however, the trade union and labour movement of Weimar Germany remained largely a movement of the manual working class, in membership, electoral support and orientation. This was to prove both its strength and its weakness in the period from 1930 to 1933.

Following the election of September 1930 Chancellor Brüning formed a minority government and proceeded, with the passive support of the SPD, to subject the economy to a series of severe deflationary measures. In the field of employment and social policy, Brüning not only cut unemployment benefit, but also began to intervene in collective bargaining, initially by the compulsory imposition of arbitration awards which substantially reduced real wages. Then, with the promulgation of the 4th Decree of the *Reich* President to Safeguard Economic and Financial Stability and to Protect Internal Peace (8 December 1931), the government virtually abolished autonomous collective bargaining: collective agreements currently in force were declared null and void and new 'agreements' were imposed which led to wage cuts of around 10%.

By the middle of 1932, however, even these measures proved to be too moderate for Field-Marshal Hindenburg, the anti-republican veteran of the Kaiser's army who had been elected President of the Republic in 1925. Hindenburg dismissed Brüning and appointed in his place Baron Franz von Papen, an extreme right-wing member of the Centre Party. Under Papen, intervention in collective bargaining reached a climax in September 1932, when the Decree of the Reich President to Stimulate the Economy allowed employers to cut collectively agreed wage and salary rates by up to 20%. By this time the *Reichstag* had been completely supplanted by emergency decree as the source of new legislation: while in 1930 there had been 98 *Reich* statutes and only 5 emergency decrees, in 1932 there were only 5 statutes and 66 decrees. However, it was Papen's use of an emergency decree in July 1932 to suspend the SPD-led Prussian state government which, in retrospect, proved to be the decisive blow to the Weimar Republic. The SPD leadership appeared to believe that mass mobilisation against this decree would be futile, and therefore confined itself to lodging an appeal with the *Reich* Constitutional Court (which it lost); at the same time, it called on the electorate to show its disapproval of Papen by voting SPD in the forthcoming election.

The lack of active resistance by the SPD and its trade union allies to this 'clear and open violation of the constitution'[40] stands in marked contrast to the mobilisation of the labour movement in 1920 against the Kapp Putsch. But by the middle of 1932, the trade unions were weakened tremendously by the catastrophic levels of unemployment.

TABLE 1.1
UNEMPLOYMENT AND SHORT-TIME WORKING 1919–32 (%)

	Unemployment	Short-Time Working
1919	3.7	–
1920	3.8	–
1921	2.8	5.4
1922	1.5	2.8
1923	10.2	26.8
1924	11.4	15.3
1925	8.3	8.6
1926	17.9	16.0
1927	8.8	3.4
1928	9.7	5.7
1929	14.6	7.5
1930	22.7	13.8
1931	34.7	19.7
1932	44.4	22.6

NOTE Figures for 1919–23 refer to unemployment amongst trade union members; those for 1924–32 to the number of unemployed registered at local labour offices.

SOURCE Official government statistics, quoted from J. Kuczynski, *Die Lage der Arbeiterklasse 1917–1933* (Akademie-Verlag, Berlin, 1966), pp. 155, 197, 198.

(see Table 1.1) and the virtual abolition of free collective bargaining, while the SPD, enfeebled by months of passive toleration of reactionary government policies, seemed incapable of taking any independent political initiatives at national level. Kahn-Freund later commented bitterly that the 'pathetic craving for "legality" and "constitutionalism", which paralysed the German left and finally led to its downfall, stands condemned in the eyes of the historian.'[41] The German Communist Party also stands condemned, despite its often incisive criticisms of the shortcomings of Weimar democracy. Its largely mechanical adherence to the Soviet model of party organisation and political change meant that it proved incapable of developing an adequate response to the crisis in German society. Moreover, its failure to understand the nature of fascism, most crudely exemplified by its characterisation of the SPD between 1929 and 1932 as 'social fascist',[42] served to reinforce the divisions between communists and social democrats at a time when only their unity might have provided an effective resistance to Hitler's rise to power. As Wolfgang Abendroth has argued: 'the enmity between its two working class parties . . . made the victory of fascism possible in the key country of central Europe'.[43]

Nevertheless, these divisions within the labour movement by no means made Hitler's assumption of power inevitable. The Nazis lost two million votes in the election of November 1932, and in the weeks following the election suffered a severe organisational and financial crisis. As Erich Eyck remembered: 'the legend of their irresistible progress and invulnerability had been shown (to be) false. Indeed, one got the impression that the National Socialist movement had passed its peak and was starting to decline.'[44] At the same time, unemployment was decreasing after reaching its height in February 1932, and the economy, while still in deep crisis, was at least stabilising at the bottom of the recession. But a series of political manoeuverings, in which von Papen played an important role, culminated in Hindenburg's invitation to Hitler to become Chancellor on 30 January 1933. The rest is history. Hitler proceeded to destroy the political organisations of the labour movement and the independent trade union movement, and with them what was left of the framework of Weimar labour law.

Trade Unions and Industrial Relations in Germany 1868–1933

In this section we examine the development of industrial relations in Germany between 1868 and 1933, and in particular the way in which German trade unions changed from a reliance on their own organisational strength and autonomous action before 1914 to an increasing reliance on positive legal and constitutional rights and state policy in the Weimar period.[45] The legal framework of industrial relations will be outlined in greater detail in the next section.

The Growth of Autonomous Trade Unionism and Collective Bargaining 1868–1914

Independent trade unionism in Germany did not achieve a permanent foothold until the 1860s, when, despite regional state laws banning combinations of workmen, local trade unions began to assert their strength in a series of strikes. In this same decade, two national political organisations of German labour were established (they merged to form the SPD in 1875), and, in contrast to Britain, where the TUC founded the Labour Party, it was the leaders of these political organisations who founded the first national trade union confederation in 1868. In fact three trade union confederations were founded in this year in Germany, differentiated into three distinct 'ideological tendencies' (*Richtungsgewerkschaften*): the 'free'[46] unions, closely allied to the socialist labour movement; the Christian trade unions,[47] founded by members of the Catholic Centre Party; and the Hirsch-Duncker

union federation,[48] inspired by what its two founders felt to be the 'non-ideological' approach of British trade unions. While this ideological split had no significant effect on the organisation of manual employees, where the socialist unions remained virtually unchallenged right up until 1933 (see Table 1.2), it did substantially affect the organisation of salaried employees (*Angestellte*) in the Weimar Republic. By 1931 the Christian unions organised nearly 35% and the Hirsch-Duncker federation around 23% of total union membership amongst salaried employees, while the socialist General Free Federation of Salaried Employees (the *AfA-Bund*) claimed only 27%.[49]

The German trade union movement had a second structural characteristic whose origins can be traced back to the 1860s, namely the division into separate 'occupational' organisations for manual workers (*Arbeiter*), salaried employees (*Angestellte*) and civil servants (*Beamte*). When the anti-combination laws were repealed in the late 1860s and early 1870s, freedom of association was formally granted only to industrial manual workers (*gewerbliche Arbeiter*), and not to other occupational groups such as agricultural workers, domestic servants, salaried employees and civil servants. This early distinction in law between the employment and trade union rights of different categories of employee was to have an important impact on the subsequent development of trade union organisation, industrial relations and social policy in the Weimar Republic.

The modern history of German trade unionism and industrial relations dates in fact from 1890, the year of the repeal of the so-called 'Socialist Laws' (*Sozialistengesetze*) of 1878. These laws, which had prohibited social democratic organisation and public meetings, had been passed as a response to the growth in industrial militancy and, above all, to the substantial increase in popular support for the Social Democratic Party. Immediately after enactment many socialist trade unions were dissolved because of their alleged 'social democratic activities', and others were forced to transform themselves into friendly societies, educational organisations and even singing and theatre clubs in order to avoid proscription as 'political organisations'.

This deliberate use of state power by Bismarck in order to prevent the growth of independent working-class organisation was complemented by the introduction of a state system of social security for individual employees. Bismarck was quite explicit about the aim of this dual strategy, namely to 'heal social wrongs not just by the repression of social democratic excesses but simultaneously by positively advancing the well-being of the workers'.[50] By 1889 Germany had the most advanced national insurance system in the world, providing benefits

which covered health (1883), accidents (1884), disability (1889) and old-age pensions (1889) (unemployment insurance was not introduced until 1927). However, this strategy failed to stem the growth of the labour movement. Pay, working conditions and work relations were not touched by the welfare system, and growing industrial militancy on these issues culminated in 1889 in a strike of 150,000 workers in the Ruhr mining industry. Union membership also grew consistently, so that, while there were only around 50,000 workers organised in 'free' trade unions in 1877, by the end of 1890 there were around 300,000 members organised in 58 national federations.[51] In 1890 a 'General Commission of German Trade Unions' was founded to co-ordinate the activities of individual socialist union federations, and its membership had risen by 1913 to over two-and-a-half million. In 1919 it was renamed the General Federation of German Trade Unions (ADGB).

One of the main features of the evolution of the socialist trade union movement between 1890 and 1914 was the development of an identity and objectives which were clearly distinct from those of the Social Democratic Party. As we have seen, the 'free' German trade unions grew initially out of the socialist political movement, and the leaders of the first national trade union confederation of 1868 regarded the unions quite explicitly as 'a kind of front organisation from whose ranks the party could recruit members'.[52] As late as 1893, Carl Legien, the head of the General Commission of German Trade Unions and the dominant figure in the socialist trade union movement from 1890 until his death in 1920, described the unions as 'recruiting schools of the party', insisting that they had never been regarded as 'anything but a palliative within present-day bourgeois society'.[53] By the Mannheim party congress of 1906, however, the SPD had openly recognised the 'parity' of both organisations within the labour movement, renouncing its demand that the trade unions should be subordinated to party discipline while retaining the commitment to seek a mutual understanding between the organisations in matters of common interest. In 1915 Legien wrote that he regarded the SPD as the 'representative of the political interests of the trade unions'.[54]

What were the main reasons for this change in the relations between the SPD and the trade unions? Briefly, while the SPD was unable, despite its massive increase in electoral support, to achieve any palpable influence in its main sphere of activity, the state and the political system, the trade unions were able to establish a set of institutions and practices outside the sphere of state regulation which provided a degree of protection and a wide range of immediate benefits and services for their members. In the two decades before the outbreak of World War

One, union officials began to participate with employers in the work of local employment offices, grievance and negotiating committees were developed at plant level,[55] 'labour secretariats' were set up to provide advice for workers on the state insurance system, and unions developed their own independent mutual insurance schemes to cover strike pay, sickness, accidents, unemployment and even removal expenses.[56]

From the mid-1890s, however, the most important development in industrial relations was the growth of collective bargaining and collective agreements. Initially, the 'free' trade union movement was extremely hostile towards the conclusion of collective agreements. When the Book Printers' Union established a central joint negotiating committee and a joint arbitration procedure with their employers in 1896, the Leipzig branch of the union federation was expelled from its local 'cartel' (comprising branches of all socialist unions in the municipality) on the grounds that it was replacing collective organisation and class struggle by collaboration with the employers. This matter was debated at successive national trade union conferences, and it was eventually decided to support the negotiation of collective agreements only in cases where independent trade unions and employers' associations possessed strong autonomous organisations.[57] This 'voluntary' approach to collective bargaining and the conclusion of collective agreements dominated trade union thinking and practice in Germany before 1914. Although collective agreements were not contractually binding on the collective parties in this period, they were only rarely breached by employers. As Wolfgang Däubler has argued: 'the agreements were upheld through the strength of the trade unions and their permanent readiness to take industrial action'.[58]

Between 1896 and 1913, the number of collective agreements for manual workers increased substantially. While in 1896 they hardly existed, by 1913 there were around 13,500 in force, largely operating at local and regional levels and covering over two million workers in around 218,000 establishments. But the unions failed almost completely before 1914 to achieve recognition in heavy industry, mainly because the employers mounted a co-ordinated campaign of resistance to the whole idea of joint regulation of employment, which they saw as a political challenge to their overall power and authority in society. The attitude of hostility towards collective bargaining was classically expressed in 1890 by H.A. Bueck, General Secretary of the Central Association of German Industrialists: 'German employers will never be prepared to negotiate with workers' organisations on an equal footing'.[59] In the face of this opposition, the fact that by 1914 just under 20% of German manual workers were covered by collective agreements was a significant, if limited, achievement.

The progress of the free trade unions was reflected in the growth of membership from 300,000 in 1890 to over two million in 1914. While Legien could claim in 1898 that the vast majority of union members were also in the SPD, by 1914 party membership had only risen to just over one million. The trade union movement had thus become firmly established, but it was still a long way from achieving general social, legal and political recognition. This was clearly illustrated by a series of events which started with the defeat of the socialist unions after a short and violent coal strike in the Ruhr in March 1912.[60] Troops were sent into the area by the government, and criminal charges were brought against individual strikers, resulting in a large number of prison sentences, mostly for the offence of 'personal insults' to strike-breakers. In the following months, the right to picket was continually restricted by the police on the grounds of obstruction of the highway, and union branches were deemed by the courts to be political associations, which meant that they required police permission to hold meetings and were prohibited from recruiting minors. In addition, employers' associations mounted a campaign to persuade the government to limit even further the rights of association and freedom of action of trade unionists.

Resistance to the rise of the independent trade union movement was thus a characteristic attitude of the big employers in heavy industry and of the state in Imperial Germany. The tenuous position of the unions was succinctly described by the historian and social reformer, Lujo Brentano: 'Workers have the right to combine. But if they make use of it, they are punished.'[61] Or, in the famous words of the pioneering labour lawyer, Philipp Lotmar: 'The trade union is free, as free as an outlaw' ('Die Gewerkschaft ist frei, aber sie ist vogelfrei').[62] It was therefore understandable that, after 1918, many trade union leaders were prepared to relinquish their earlier reliance on autonomous action and voluntary organisation when the state promised to deliver acceptance and recognition through legal guarantees. What they did not foresee was that reliance on the state and the law could lead, under changed economic and political circumstances, to a loss of the will and capacity to take independent action, which are the ultimate source of all trade union power and influence.

The Recognition of Trade Unions and Collective Bargaining: 1914–19

In August 1914 the General Commission of German Trade Unions decided to give its full support to the national war effort, partly because it wished to avoid the complete suppression of free trade unionism and partly because it shared the widespread fear of a Czarist take-over of the German *Reich*.[63] Union leaders demonstrated their willingness to subordinate immediate aims to the needs of national defence by agreeing

to relinquish the rights to strike and to negotiate wage increases. In the following years, union officials co-operated closely with the civil and military authorities and became involved in a number of public and quasi-public institutions concerned with manpower problems, such as local employment offices and boards for the rehabilitation of disabled war veterans.

In response to this change in union strategy the government introduced measures which resulted in greater state recognition of trade unions and of collective representation in general. In June 1916 the *Reichstag* exempted the trade unions from the restrictive law of association covering political organisations, and, under the Auxiliary Service Law (*HDG*) of December 1916, trade unions (rather than individual employees) were accorded the right of nomination to arbitration and conciliation bodies. This law also gave employees the statutory right to establish workers' and salaried employees' committees (*Arbeiter- und Angestelltenausschüsse*) at plant level.

The trend towards greater co-operation and mutual recognition between the socialist trade unions, the employers and various governmental bodies was conditional on the agreement of the unions to the compulsory mobilisation of labour and the renunciation of what in peacetime would have been regarded as fundamental trade union rights. It was not surprising, therefore, that many German trade unionists and SPD members began to challenge the integrative policy of their leaders, particularly from 1916 and 1917 when real wages declined significantly, food rations were reduced, internal political repression was increased and the war continued its course with no sign of an early or positive conclusion. Opposition to the strategy of the union leadership came from local union branches, supplemented, and subsequently replaced, by the factory-based workers' committees. These committees were particularly important in the big munitions factories, and, as we have seen, the munitions workers also pioneered the development of 'workers' councils' (*Arbeiterräte*), which contained representatives from local union branches and workers' committees and became the spokesmen for organised labour in a number of major cities in 1918 and 1919.

Between 1914 and 1918, therefore, the official trade union movement had achieved an unprecedented degree of state recognition and social status, but it was being increasingly challenged by unofficial bodies which provided an alternative organisational and ideological framework for the expression of workers' interests. In October and early November, trade union leaders, alarmed by these developments and by the political vacuum created by the collapse of the Imperial

system, held a number of secret meetings with leading industrialists to discuss demobilisation and the transition to a peacetime economy. But these meetings were soon overtaken by events which threatened the very existence of both trade unions and private employers, and which provided the basis for the historic agreement between them on 15 November 1918. As Braunthal has argued:

> once the Revolution erupted the employers were ready to make major concessions to the unions which they viewed as a bulwark against the threat of anarchy, bolshevism, and the socialisation of industry, and because they wanted to keep state intervention to a minimum. The labour leaders were willing to sign an agreement with the employers not only because they would make substantive gains but also because they too were frightened by the revolutionary political situation and feared a collapse of their own organisation as well as an economic breakdown unless employers helped to shore up the economy.[64]

Thus, just six days after the outbreak of the November Revolution, the 'Stinnes-Legien Agreement' (named after the leaders of the employer and union delegations, Hugo Stinnes and Carl Legien) was signed. The concessions which the employers made to the unions included: recognition of independent trade unions and collective agreements; disbandment of 'yellow' company unions; cessation of discrimination against union members; recognition of the eight-hour-day (subject to its introduction by other large industrial nations); establishment of jointly managed employment offices and arbitration bodies; and recognition of committees to represent all employees in plants with more than fifty workers. In addition, a Central Joint Labour Committee (*Zentralarbeitsgemeinschaft*) was created at national level on 4 December, composed of an equal number of union and employer members: it was charged with discussing demobilisation and advising the government on industrial and social policy.[65] Many of the concessions of the Stinnes-Legien Agreement were subsequently embodied in statutory or constitutional provisions. (These will be examined in the next section.)

While union leaders were co-operating with the employers in an attempt to re-establish industrial stability through joint consultation and collaboration, the councils' movement maintained a powerful momentum during the winter of 1918–19. Mass strikes from January to April 1919 were neither initiated nor supported by the General Commission, and at one stage the SPD seemed to be prepared to give the councils rather than the unions the central role in the new constitutional framework of economic and industrial management.[66] But, as we

have seen, the councils' movement suffered a major political and military defeat between March and May 1919, and the Law of Works Councils (1920) eventually accorded them an important though subsidiary role as worker representative bodies at plant level.

In a period of a few days in November 1918, the trade unions had been able to secure a degree of employer recognition consistently denied to them during the previous fifty years of their existence. But without the political and military collapse of Germany in 1918 and the fundamental threat to the employers posed by the councils' movement, it is unlikely that German industrialists would have agreed to recognise trade unions and collective bargaining as readily and comprehensively as they did. It remained to be seen whether the trade union movement would be able to retain its influence on the employers and the state in the very different conditions of a peacetime economy.

The Heyday and the Decline of Autonomous Trade Unionism and Collective Bargaining: 1919–33

The German trade union movement, led by the socialist union confederation for manual workers, the ADGB, achieved its greatest political and industrial influence in the immediate postwar years. Its political influence was expressed not only in the constitutional guarantee of freedom of association and the full statutory recognition of collective bargaining, but also in the mobilisation of union power in support of the Weimar Republic, notably during the Kapp Putsch of March 1920.

TABLE 1.2
MANUAL TRADE UNION MEMBERSHIP IN GERMANY 1913–31 (1000s)

	'Free' (Socialist) Trade Unions	Christian Unions	'Liberal' (Hirsch-Duncker) Unions	Total
1913	2574	343	107	3024
1914	2076	283	78	2437
1918	1665	405	114	2184
1919	5479	858	190	6527
1920	7890	1077	226	9193
1923	7138	938	216	8292
1924	4618	613	147	5378
1926	3977	532	163	4672
1928	4654	647	169	5469
1930	4822	659	198	5679
1931	4418	578	181	5177

SOURCE: J. Kuczynski, *Die Lage der Arbeiterklasse 1917–1933* (Akademie-Verlag, Berlin, 1966), p. 243.

The post-war period also saw far-reaching changes in the industrial activities and organisation of the trade unions. Firstly, there was a massive increase in overall membership amongst manual workers, which rose from around 3 million in 1913 to over 6.5 million in 1919 and nearly 9.2 million in 1920: membership in the socialist unions affiliated to the ADGB rose from just over 2.5 million in 1913 to nearly 8 million in 1920 (see Table 1.2). Secondly, while the number of collective agreements in force for manual workers remained comparatively stable (around 11,000 in 1913, reaching over 11,500 in 1920, then falling to under 11,000 by 1922), the number of workers covered by collective agreements rose rapidly from under 2 million in 1913 to just under 6 million in 1919, reaching over 14 million in 1922.[67] Thirdly, the militancy of trade unions and their capacity for taking autonomous action, as reflected in the number of strikes, strikers and plants involved, showed a tremendous upsurge, reaching a climax in 1920 and remaining relatively high until 1922. Fourthly, the 'free' unions were able in this period to establish effective control over the new statutory works councils, so that, by 1922, over three-quarters of the 250,000 councillors were socialist union members.[68]

TABLE 1.3
STRIKE ACTIVITY 1913–32

	Strikes	Plants Affected	Strikers
1913	2127	9007	254,206
1914	1115	5213	56,682
1919	4581	45690	4,468,761
1920	8101	190398	8,100,652
1921	4890	58005	1,991,475
1922	4945	52303	2,176,255
1923	2093	27681	1,925,037
1924	1973	28430	1,618,011
1925	1766	25214	758,071
1926	383	2949	99,227
1927	871	10480	493,680
1928	763	8062	723,415
1929	441	8616	223,878
1930	353	3403	223,885
1931	463	4753	172,139
1932	648	2610	129,468

SOURCES: D. Fricke, *Zur Organisation und Tätigkeit der deutschen Arbeiterbewegung 1890–1914* (Leipzig, 1962), p. 260 for 1913–14: J. Kuczynski, *Die Lage der Arbeiterklasse 1917–1933* (Berlin, 1966), p. 245 for 1919–32.

Despite this great increase in union organisation and militancy after 1918, the economic bargaining power of the unions was insufficient to achieve a significant improvement in the living standards of their members: by 1922, real wages were still below the highest pre-war levels.[69] Then, in 1923, union organisation was undermined by mounting unemployment (which reached 23.6% in the autumn of 1923) and by a massive increase in inflation, which rendered negotiations with employers and collective agreements about wage rates completely meaningless.

For the trade unions affiliated to the ADGB, the 1924–9 period was a time of consolidation, a return to stability and the prosecution of trade union goals by constitutionally recognised methods. After a steep drop of over 2.5 million between 1923 and 1924, total ADGB membership remained relatively stable over the rest of the Weimar era, fluctuating between four and five million. The increase in economic activity and labour productivity between 1924 and 1928 enabled trade unions to negotiate significant increases for their members, so that by 1928, real wages rose above the highest pre-war level for the first time in the Weimar Republic. In addition, as a result of close co-operation between the trade unions, the SPD and the republican parties in the government, a series of employment and social policy measures were passed in this period which seemed to provide concrete justification for the increasing reliance of the ADGB on state support.[70]

The events following the economic crash of 1929, however, were to destroy one by one the gains made by the trade union movement since 1918, particularly in the field of social policy (*Sozialpolitik*), which the ADGB claimed as late as 1929 was 'the touchstone for the approval of every government'.[71] By early 1930 the huge rise in unemployment (see Table 1.1) virtually destroyed the new state system of unemployment insurance, and the last republican coalition of Weimar Germany broke up because the SPD was unwilling to preside over the dismantling of the whole insurance system. Then followed a period of rule by presidential decree, which, as we have seen, effectively abolished voluntary collective bargaining. By this time, well over 30% of employees were without jobs and over 20% were working short-time. Moreover, the Nazi Party was gaining in electoral support and threatening to seize power.

In these circumstances, the achievement of immediate trade union goals and the use of traditional trade union methods were subordinated to the priority of finding a political solution to the economic crisis: relations between the ADGB and the government replaced relations between individual unions and employers' associations as the central focus of trade union activity. Thus, although the interventions of the

Brüning government (which the ADGB dubbed a 'tacit dictatorship')[72] in wage determination and collective bargaining were strongly criticised by the unions as an attack on basic trade union rights, they were eventually 'tolerated' on the grounds that to oppose Brüning would be to open the way for Nazi dictatorship. For the same reason, the ADGB supported the arch-conservative Hindenburg against Hitler in the Presidential election of 1932, and also flirted in December and January 1933 with the plans of the new Chancellor General Kurt von Schleicher to incorporate all employee organisations (including those of the Nazis) into a 'united labour front'.[73] The 'helplessness of this defensive policy'[74] was clearly demonstrated in the tragic epilogue to Weimar trade unionism in April and May 1933. In the hope of saving their organisations from total destruction, ADGB leaders openly declared that the victory of National Socialism was a victory for trade unionism, and requested their members to participate in the Nazi-controlled May Day rally 'for the honour of creative labour, for the complete incorporation of the working masses into the state'.[75] It was all to no avail. On the following day, union offices all over Germany were occupied by the SA and SS, and many ADGB leaders and officials were arrested and imprisoned.

We have already argued that the political resistance of the labour movement to fascism was substantially impaired by the hostility between social democrats and communists, and that the capacity of the trade unions to become a powerful democratic force in German society was further weakened by occupational and ideological divisions, many of which could be traced back to the 1860s.[76] In our examination of the development of trade unions and industrial relations between 1914 and 1933, however, we have concentrated particularly on the interaction between the socialist trade unions and the state, as this provides the general framework for an understanding of the theme of this book, the relation between labour law and politics. It was the socialist unions who were prepared, during the First World War and the aftermath of the November Revolution, to relinquish their historic reliance on autonomous action in order to achieve comprehensive state and employer recognition. But under the changed political and economic circumstances of the years 1922–33, state intervention was increasingly used against the socialist unions and their members, a development which they ultimately proved unable to resist. All these trends have been succinctly summarised by Gerard Braunthal:

> the increased intervention of the state in the economic realm, especially during the Depression years, and labour participation in public administrative bodies, accentuated the problems faced by the

unions in their relationship to the state. As a result, the unions increasingly lost their independence of action and their militancy. Ironically, this trend occurred after the unions had openly or tacitly welcomed government intervention in the labour field as a means of improving their own position.

Since the survival of democracy in Germany depended on the strength of organisations committed to its defence, the position of the trade unions vis-à-vis the state was of crucial importance. If a proper balance in their relationship to it had been established, such as less reliance upon its services, then they would have enjoyed more autonomy and freedom of action. This might have resulted in a greater degree of militancy against the fascist menace.[77]

In the next section, we shall examine in outline the main phases in the development of a legal framework of industrial relations in Germany from 1869 to 1933, giving a short summary of the main statutes and provisions of Weimar labour law. Further details about the substance of the statutes and regulations are contained in Appendix 2 and in the three translated writings by Otto Kahn-Freund.

Employment Legislation and Labour Law in Germany: 1869–1933

In a study of the role of labour tribunals published in 1929, Franz Neumann argued that the attitude of the state towards the trade unions in capitalist society could be analysed logically and historically in terms of four ideal types: repression, toleration, recognition and incorporation.[78] Neumann discerned this pattern of historical development, at least down to the recognition phase, not only in Germany, but also in France and Britain.[79] His major concern, however, was to examine the evolution of the legal framework of industrial relations in Germany. In this specific area, he was able to trace the development between 1869 and 1927 from an 'individualistic' system of employment legislation, based on the primacy of the civil-law institutions of private property and contractual freedom, to a 'collectivist' system of labour law (*Arbeitsrecht*) or 'social law', based on the primacy of collective organisation and collective agreements.

In Germany, the 'repression' phase in state-union relations lasted until 1869. The role of the law in this period was exemplified by the provisions of the Prussian General Civil Code, which prohibited union membership and organisation and declared strikes to be illegal. The 'toleration' phase was heralded in 1869 by the Industrial Code (*Gewerbeordnung – GewO*) of the newly constituted North German

Confederation (extended in 1871 to the whole German *Reich*), which lifted the ban on combinations, although, as we have seen, this only applied to industrial manual workers.

Between 1871 and 1914, there were two distinct periods in the development of employment legislation and state-union relations. During the Bismarck era, particularly at the time of the 'Socialist Laws' (1878–90), the prohibition of social democratic agitation and the use of the criminal law to impede trade union activities were complemented by a programme of social legislation which aimed to provide state protection and welfare provision for individual employees. Although the political aspect of Bismarck's strategy was largely unsuccessful, the policy of encouraging state support for individual workers was maintained right up until the outbreak of the First World War. Between 1890 and 1914, successive governments continued to extend the provisions of the Industrial Code which provided a floor of rights for individual employees (relating to maximum hours of work, Sunday work, social insurance), and new statutes were passed which established formal procedures for the resolution of individual employment grievances. However, the hostility of the state to the development of collective labour law and collective organisation was maintained.

The legal framework decisively influenced the way in which collective bargaining and trade unionism developed from the mid-1890s. Before 1914, the rules governing collective labour relations in Germany were generally established not by statutory provision but by voluntary joint negotiation. The recognition of trade unions and plant-level workers' committees and the growth in the number and coverage of collective agreements in this period 'completely by-passed the legislature'.[80] As far as the German trade unions were concerned, if the law did not seriously impede the growth of collective bargaining, and employer acceptance of collectively agreed terms and conditions of employment could be achieved without it, then statutory support for collective bargaining might not actually be necessary. Such an attitude might have been expected among contemporary British trade unionists, steeped as many of them were in the ideology of laissez-faire, but it is at first sight surprising to find it among German trade unionists. However, the labour movement in Imperial Germany was clearly conscious of the overall hostility of the state apparatus (the government, civil service, judiciary, police and military), and was understandably wary of the possible legal restrictions which could result from the introduction of a comprehensive legal framework of collective labour relations. In fact, a series of decisions in the civil courts between 1900 and 1914, which *inter alia* asserted the primacy of the individual contract of employment

over the collective agreement (that is, the right of the employer to deviate from collectively agreed terms to the disadvantage of the individual employee), served to reinforce the belief that such agreements would and could only be socially effective if trade unions were strong enough to enforce them by autonomous organisation and independent action.[81] This view also predominated in the SPD. It is true that a few party members were in favour of the principle of the legal regulation of industrial relations, but they too opposed the introduction of a positive collective bargaining law in the pre-war period, arguing that it would in effect provide a 'statutory strait-jacket'[82] for independent trade unionism at a time when the unions were still not powerful enough to secure voluntary recognition from employers.

This whole approach of the state and the trade unions towards collective organisation and collective agreements was transformed by the war and the November Revolution. We have already shown how the trade unions moved towards an increased reliance on state policy and a positive and interventionist framework for collective labour relations. Martiny has interpreted this development not as a strategic change in union ideology, but as a tactical shift, initially to secure the recognition of collective bargaining in heavy industry, and subsequently as a means of strengthening official union organisation against the more radical rank-and-file pressure emanating from the councils' movement.[83] Fraenkel, however, advanced a more sociological view of this change in trade union policy,[84] a view which Kahn-Freund also adopted. Before 1914 relatively favourable market conditions meant that the economic power of the unions was greater than their political power. After 1918, in contrast, the political power of the trade unions was potentially far greater than their economic power and, consequently, they relied more and more on the law and state social policy. What is beyond doubt is that the triumph of political democracy in 1918 brought with it explicit state recognition of the trade unions and strong legal support for trade union organisation and collective bargaining.

What were the main features of Weimar labour law? According to Walter Kaskel, a leading academic labour lawyer in Weimar Germany, there were three basic principles underlying the new collectivist system:[85]
(i) The primacy of the collective agreement over the individual contract of employment. The Collective Agreements Decree (*Tarifvertragsverordnung – TVV*) of December 1918 gave collective agreements an automatic and compulsory legal effect upon all relevant contracts of employment, that is, the individual contract of employment between each employee and his employer was not to deviate from the collective agreement to the detriment of the employee. Also embodied in the Decree was the

principle of 'extension', which empowered the *Reich* Minister of Labour to extend collectively negotiated terms of employment to those employees and employers who were not otherwise covered by collective bargaining.

(ii) The replacement of the 'absolutist' principle by the 'constitutional' principle at the level of the works (*Betrieb*), that is, at plant or establishment level. This principle was embodied primarily in Article 165 of the Weimar Constitution (see Appendix 3) and in the Law of Works Councils (*Betriebsrätegesetz – BRG*) of February 1920. It gave employees through their elected representative body, the works council (*Betriebsrat*), rights of participation on a number of social and economic issues at plant level.

(iii) The recognition and institutionalisation of the role of the state in determining the form and substance of the employment relationship. As examples of this principle, Kaskel cited the 'order imposing compulsory effect' (*Verbindlicherklärung*) on arbitration awards, contained in the Arbitration Decree (*Schlichtungsverordnung – SchlVO*) of October 1923,[86] and the principle of 'extension' of collective agreements.

These basic principles of Weimar labour law were supplemented by a number of other measures specifying the rights and obligations of employees. They were contained in statutes, such as the Employment Service and Unemployment Insurance Law (*AVAVG*) of 1927, decrees such as the Decree on Working Time (*AZVO*) of 1923, and orders, such as the Collective Agreements Order (*TVO*) of 1923. These enactments, listed and summarised in Appendix 2, form a large part of the detailed subject matter of Kahn-Freund's writings in this volume. There are, however, two specific areas which merit analysis at this point, namely the promise of a 'unified labour law' (Article 157 of the Weimar Constitution) and the system of labour tribunals.

In May 1919 a 'Working Committee for a Unified Labour Law' was established by the *Reich* Minister of Labour, but, after encountering systematic opposition from the Ministries of Justice and Labour as well as from the judiciary and academic jurisprudence, it was dissolved in 1924, 'allegedly for financial reasons'.[87] The failure to create a self-contained, unified Labour Code (*Arbeitsgesetzbuch*) had two important consequences. Firstly, it meant that the distinction between the legal rights and obligations of manual workers, salaried employees and civil servants was carried over from Imperial Germany into the Weimar system, albeit with a few significant exceptions. For example, the works councils were defined in law as 'unified' employee representative bodies, although even here the election of councillors was conducted separately for manual and white-collar employees, and 'group councils'

(*Gruppenräte*) had separate participation rights on matters such as discipline and dismissal. Secondly, as Ernst Fraenkel pointed out,[88] it meant that there were at least three different 'strata' of employment law erected on top of one another: the law of the liberal-capitalist era based on the contract of employment and supplemented by a series of protective statutes; collective labour law, developed 'socially' between 1900 and 1914 and subsequently recognised and enforced by the state; and the 'translation' into law of the revolutionary demands and activities of 1918–19 (for instance, the institutionalisation of the works councils). This fragmentation of employment legislation created a legal minefield of technical, historical and ideological inconsistencies and gave the Weimar judiciary ample freedom of manoeuvre to develop a body of its own case law independent of any particular statutory provision.

The other topic which merits discussion here is the system of labour tribunals in Weimar Germany.[89] Kahn-Freund's Weimar articles were written from the vantage point of his own 'inside' position as a legal chairman of one of the panels of the Berlin labour tribunal, and much of his critique was directed at the intervention of the judiciary in industrial relations.

The system of labour tribunals was set up under the Law of Labour Tribunals (*AGG*) of 1926, but its historical antecedents went back at least as far as the law of 1890 on industrial tribunals for manual workers (*Gewerbegerichtsgesetz – GewGG*) and the law of 1904 on the separate commercial tribunals for clerical workers (*Kaufmannsgerichtsgesetz – KGG*). These were tripartite bodies composed of two laymen, one from the employee's and one from the employer's side, and a chairman who was a professional judge or, in the commercial tribunal, a higher civil servant. Before 1926, these tribunals only took the place of the lowest level of ordinary courts (*Amtsgerichte*) and had only a narrow jurisdiction. Cases arising from strikes or collective agreements, for example, were decided in the ordinary courts, which predictably exhibited what the labour movement regarded as a 'class bias' against the unions. It was against this historical background that the German trade unions decided to press for the introduction of a comprehensive system of labour tribunals, which in fact came into operation on 1 January 1927.

The new system of labour tribunals had a wide jurisdiction over individual and also collective disputes, though not over the conclusion of new collective agreements (conflicts of interests). It was established at three levels: the local labour tribunal (*Arbeitsgericht*), the regional state labour tribunal (*Landesarbeitsgericht*), and the *Reich* Labour Court (*Reichsarbeitsgericht* or *RAG*). The composition of the tribunals remained tri-partite, but now the laymen were nominated exclusively

through the representative organisations of capital and labour, that is, through employers' associations and trade unions. The *Reich* Labour Court was, however, a division (*Senat*) of the *Reich* (Supreme) Court, and here the professional judges were in a three to two majority over lay members. This was crucial, because the lower tribunals were in fact controlled by the Highest Court, where only professional advocates had the right to represent clients. The *RAG* 'carried on the legal tradition' of the *Reich* Court 'in all important questions'.[90]

The law and the legal system played a central role in the industrial relations of Weimar Germany, but in ways which were not intended by union leaders or social democratic politicians. The statutes, regulations and orders were subject to the interpretation of the judges, who consistently distorted the 'collectivist' letter and spirit of the new laws. This point was forcefully made by Neumann, Fraenkel and Kahn-Freund,[91] and Kahn-Freund's writings in particular contained a systematic and trenchant critique of the case law and the 'civil service ideology'[92] of the Weimar judiciary. But the policy of the judges was not the only factor which undermined the original intention of Weimar collectivism. Fraenkel argued that labour law tends, almost of necessity, to fragment industrial relations into thousands of individual cases and questions, and that this had led trade unionists to become pre-occupied with the exploitation of specific statutory rights and to over-estimate the importance of the law for the achievement of union aims.[93] He also pointed to a fundamental omission in the overall system of Weimar collectivism, namely its failure to make any decisive impact on the economic organisation of society: 'the development of economic law did not keep pace with that of labour law'.[94] The state had strong powers on issues of social policy, but virtually no power on issues of economic policy such as price movements, investment and employment levels.

Why, then, did the social democratic movement in Weimar Germany place such emphasis on the importance of labour law? After all, in the Britain of the 1920s, it was not such a fundamental issue, even though the government passed the Trade Disputes and Trade Unions Act in 1927 by way of punishing the unions for the General Strike of 1926. In short, the political and social environment in Germany in the 1920s was quite different from any other country. For the majority of SPD and trade union leaders, progressive labour laws and social and welfare policies were the most concrete achievement of the November Revolution. Kahn-Freund wrote subsequently that, while the SPD lacked credibility as a party committed to radical political and economic change, 'it was desperately serious in all matters of trade union rights and of social

reform'.[95] Labour law lay at the heart of Weimar social democracy, it was the 'show-piece of the Republic', the 'connecting link between the Republic and the working class'.[96] To promote and defend labour law was fundamental, to attack it was to attack democracy and the Republic as a whole. As Kahn-Freund argued more than 40 years later, the 'minor tragedy of labour law' mirrored the 'major tragedy' of Germany between 1930 and 1933 and 'its unprecedented moral collapse'[97] in the following years.

The Selected German Writings of Otto Kahn-Freund

Hugo Sinzheimer 1875–1945

Otto Kahn-Freund's essay on Hugo Sinzheimer, the first of the translated writings in this volume, is a biographical, historical and theoretical examination of the life and work of the 'founder of German labour law' (p. 73). Like so many of Kahn-Freund's most incisive publications,[98] it began life as a lecture, in fact the opening lecture at a meeting held in Frankfurt-am-Main on 1 December 1975 to celebrate the 100th anniversary of Sinzheimer's birth.[99] It was subsequently published in 1976 as the introduction to a two-volume edition of Sinzheimer's collected essays and speeches.[100]

Kahn-Freund was in a unique position to review Sinzheimer's contribution to legal scholarship and political life in Weimar Germany. In Frankfurt in the 1920s, he had studied labour law and written his doctoral thesis under Sinzheimer, and subsequently became his teaching assistant and friend, remaining in contact with him, if only sporadically after 1933, until his death in 1945. As we shall attempt to show in the final section of this introduction, in many ways Kahn-Freund continued the Sinzheimer tradition in his work in Britain after 1933.

Before 1918, Hugo Sinzheimer had acquired a reputation in the field of labour law as an original thinker and social reformer. In this period, he was a lone advocate in labour movement circles of a comprehensive law of collective agreements, and his first major works were dedicated to an analysis of actual agreements (*The Collective Agreement* (1907–08)) and to the development of a statutory framework for collective bargaining (*A Statute on Collective Agreements* (1916)). Both works were to exert a powerful influence on the new collective labour law of Weimar Germany.

Like so many German intellectuals, Sinzheimer's involvement in politics and commitment to the trade union and labour movement only developed fully during the First World War and in the months following

the November Revolution of 1918. For a short time in 1918–19, he was Chief of Police in Frankfurt, and in 1919 came the high point of his involvement in practical politics, his election as an SPD representative to the National Assembly and his participation in the preparation of a constitution for the new republic. Within the space of a few months, Sinzheimer became 'the authoritative spokesman on labour and social policy for the SPD group in the National Assembly',[101] and he played a central role in the drafting of some of the key parts of the Weimar Constitution, including Article 165.

Although Sinzheimer nearly became the first Minister of Labour in Weimar Germany,[102] he soon returned to the academic world. He was appointed honorary professor of labour law in the University of Frankfurt for his part in founding the Academy of Labour in 1920, which was attached to the university and was the first state-sponsored further education college for the trade union and labour movement in Germany. In the following years, Sinzheimer continued to make regular contributions to the academic journal *Arbeitsrecht* (*Labour Law*), which he helped to found in 1914, and was also an adviser to *Die Justiz* (*The Administration of Justice*), the journal of the League of Republican Judges (founded in 1922, but never attracting more than 400 members, while the conservative League of German Judges had around 12,000 members). In 1927 he published an extended edition of his major theoretical work on labour law, *Basic Outlines of Labour Law*, and was deeply involved at the end of the Weimar Republic in the debates inside the SPD about the rise of fascism. Alongside his research, writing and teaching, Sinzheimer continued to maintain a flourishing legal practice: he was a pre-eminent advocate in the field of labour law and also a brilliant orator in the criminal courts. As an advocate, he probably achieved his greatest prominence in the notorious 'Bullerjahn case' of 1932 when, together with his socialist colleague, Kurt Rosenfeld, he successfully defended Bullerjahn, who had been sentenced to 15 years penal servitude in 1925 for betraying to the allies a cache of weapons held illegally by the German army.[103]

In 1933 Sinzheimer fled to Holland. There, he was able to write and publish two more theoretical works, *The Task of the Sociology of Law* (1935) and *Classical Jewish Scholars of German Jurisprudence* (1938), before his death in 1945. His last book, *Theory of Legislation*, was published posthumously in 1949. During his lifetime, Sinzheimer acquired a legendary reputation as a man who personified that complex 'unity of politics and scholarship'[104] which is one of the recurring themes of this volume.

Kahn-Freund began his essay by showing that Sinzheimer needed to

surmount two formidable conceptual obstacles, which were deeply ingrained in German and Continental legal thinking, in order to develop labour law as a distinct and coherent legal discipline.[105] Firstly, he had to overcome the rigid distinction between 'private' and 'public' law. This apparently formalistic distinction concealed a fundamental question of political principle.[106] Sinzheimer argued that labour law could not be confined within the traditional boundaries of either 'private' or 'public' law, though it included elements of both; rather, it constituted a new field of 'social law'.[107]

Historically, labour law had emerged as a form of state intervention (public law) to mitigate the inequality of bargaining power between the employer and the individual employee, whose relationship had hitherto been regulated by the law of contract and property (private law). The first labour laws in Germany were regulatory statutes to protect individual employees on matters such as hours of work, health and safety, and the employment of child and female labour. Many of the Weimar labour laws, however, did not involve the regulatory intervention of public law in individual employment relations, but rather the public recognition of the autonomy of collective organisations from the state. The collective agreement, in Sinzheimer's theory, was a socially-created legal institution of employment regulation, which acted both as a restriction on the private law of contract and as a guarantee against the excessive use of public-law state intervention. According to Sinzheimer, therefore, the collective agreement demonstrated the inadequacy of the distinction between private and public law in the field of employment relations.

The second conceptual obstacle which Sinzheimer had to overcome arose from the differentiation in organisational representation and social status between manual, white-collar and particularly civil service employees. Conventional German jurisprudence could not accept that the same principles of labour law should apply to all categories of employees, though this eventually became Sinzheimer's objective. The persistence of this differentiation and of the dichotomy between private and public law helps to explain why the promise of a 'unified labour law' in the Weimar Constitution was regarded as such a revolutionary commitment.

For Sinzheimer, the social basis of the employment relationship, as distinct from other contractual and property relations, was that human beings exchanged not objects, but themselves. He often, as Kahn-Freund recalled, quoted Marx's dictum that 'labour (*Arbeit*) has no other container but human flesh and blood'.[108] Although he accepted Gierke's thesis that employment was based on a relationship of dependency

involving the complete subjugation of the worker, whom Gierke characterised as a subordinate limb of the enterprise's body,[109] Sinzheimer, in common with Karl Renner, adopted the Marxian perspective that the subordination of the worker resulted ultimately from the capitalist ownership of the enterprise.[110] Under capitalism, the assumed contractual equality between the legal persons of employer and employee was a fiction which reinforced the employer's domination and the employee's subordination. Sinzheimer wished to destroy this legal mystification of the worker's actual state of dependency, which, he argued, had to be recognised before it could be mitigated and regulated by law. This is the key to what Kahn-Freund called Sinzheimer's 'anthropology', that is, the belief that the true objective of labour legislation was to advance the freedom, dignity and personality of the individual worker and workers as a whole, to assist in the emancipation of the human being as distinct from the fictional 'legal person'. The ultimate practical purpose of academic labour law was to promote legislative reforms to that end.

Sinzheimer's most decisive theoretical and practical contribution to jurisprudence was in the field of collective labour law, the legal framework of relations between trade unions, employers and the state. While most of his academic colleagues were unable to grasp the full legal implications of the growth of autonomous collective bargaining before 1914, Sinzheimer located the source of this social development in the 'law-creating capacity' of autonomous collective organisations. Trade unions and employers' associations were their own autonomous lawmakers in the field of employment through the processes of collective conflict, collective bargaining and the making and enforcement of collective agreements. 'The collective agreement did not originate in the mind of the jurist',[111] he wrote in 1916, it was a legal institution which had been developed in social reality. The task of the legislator was therefore to encourage this social development and give it legal backing.

It was Sinzheimer, also, who discovered and elaborated the classification of the legal functions of collective agreements; the normative (codification of substantive terms, for inclusion in the individual contract of employment); the obligatory (procedural arrangements, the obligation of the contracting organisations to observe the terms of an agreement and to induce their members to do likewise); and the organisational (the duty of individual employers and trade unionists to observe the terms of an agreement by virtue of their membership in one of the contracting organisations).[112] This classification may seem common-place for Continental lawyers today, but, as Kahn-Freund reminded us, in Sinzheimer's time it was a 'Copernican revolution' (p. 82). Sinzheimer's

insight that labour law was not created primarily by the state (legislature and judiciary) but by the autonomous collective forces, particularly through the normative function of collective agreements, was strongly influenced by the work of the legal sociologist Eugen Ehrlich,[113] who developed the concept of 'living law', 'social law at a higher . . . level, the law as a whole from the point of view of its effectiveness in society, not of its formal claim to be in force as a norm'.[114]

Sinzheimer's fundamental maxim in labour law was that the state should not only recognise the 'law-creating capacity' of trade unions and employers' associations, but that state law should, wherever possible, be subsidiary to autonomous regulation. If state law was to be congruent with reality, it should also recognise the principle, which underpinned the organisational function of collective agreements, that individual behaviour in the employment field was largely determined by group or collective behaviour, that is, the collective will should predominate over the individual will.

Sinzheimer's advocacy of 'state abstention' in favour of collective autonomy was, however, always substantially qualified. Where it was necessary or expedient, he argued, the state was duty bound to exercise its ultimate power to impose rules. Notwithstanding Kahn-Freund's description of him as a 'pluralist',[115] it will become clear that Sinzheimer could not entirely free himself from 'state piety' (*Staatsfrömmigkeit*), the almost mystical belief in the state as the expression of the general will of society. It was this emphasis on the ultimate primacy of the political sphere which led Sinzheimer, the draftsman of Article 165 of the Weimar Constitution, to reject the syndicalist trends in the German labour movement and to theorise industrial democracy and the economic constitution (of which the works councils were the only moderately effective part) as a supplement to political action by the state.[116]

Not all of Sinzheimer's analysis was accepted uncritically by Kahn-Freund. With the acknowledged benefit of hindsight, Kahn-Freund asked in his essay of 1975/6 whether Sinzheimer had been correct to ascribe to trade unions great cohesion, organisational power, and the ability to strictly enforce collective agreements. Kahn-Freund expressed doubts on two quite different grounds. Firstly, the collectively agreed 'peace obligation', which Sinzheimer and the legislature clearly considered to be *relative*, that is, relative to conflicts about rights contained in the agreement, was subsequently interpreted by the Weimar judges as imposing *absolute* obligations, thus enlarging the legal liabilities of trade unions already weakened by economic factors. Secondly, the assumption that organisations had complete authority over their members and the practical ability to put agreements into effect was not necessarily valid

where workgroup power resulted from full employment (though that was hardly a typical condition of the Weimar labour market, and this criticism was perhaps more of a reflection of Kahn-Freund's policy concern with the importance of 'direct democracy'[117] in contemporary Britain).

A more fundamental criticism arose from the contradiction in Sinzheimer's theory between the state's ultimate power of priority intervention and the principle that state law should normally be subsidiary to autonomous regulation. This problem confronted the trade unions and the SPD with a major dilemma between 1928 and 1932, when the ability of the unions to participate in 'autonomous regulation' on a relatively equal footing with the employers was severely weakened by the economic crisis.[118] Should the trade unions encourage supportive state intervention on their behalf, and thereby run the risk of losing their own autonomy? In the face of growing unemployment and the increasingly frequent refusal of the employers to observe the terms of collective agreements, Sinzheimer himself advocated compulsory arbitration in order to guarantee a semblance of a minimum wage. He was personally involved as an arbitrator in cases which resulted in wage cuts, and thus participated in the undermining of autonomous collective bargaining, which proved to be one of the fatal blows to Weimar democracy.[119] Kahn-Freund argued at the time, and subsequently, that compulsory arbitration, when combined with the full contractual enforceability of the collective agreement (and also mandatory wage decrees – another feature of the late Weimar period), undermined voluntary trade unionism and collective autonomy and thereby weakened the democratic defences against the rise of fascism.[120]

None of this, however, could detract from Kahn-Freund's lasting memory of Sinzheimer, so movingly captured in the final pages of his essay. Sinzheimer's life and work were an example to so many people because he personified the possibility of uniting professional integrity and academic excellence with political commitment and a concern for humanity:

> Sinzheimer wrote that 'no scholarship is possible without conviction, without a view of the totality'. The ultimate motivating factor was his active sense of justice. Like Lotmar, he strove after 'the re-establishment of the human being in the modern production process', his emancipation from the fetters laid on him by society . . . His whole work is a call to the emancipation of man.[121] (below, pp. 102, 103).

The Social Ideal of the Reich Labour Court

Kahn-Freund's monograph on the practice of the *Reich* Labour Court

(*RAG*) is a critical examination of the social ideal underlying the case law of the highest German labour court. It was published in 1931 by the leading law publisher in Weimar Germany, the *Bensheimer Verlag*, and was written over several months, in the evenings and at weekends, at a time when Kahn-Freund was employed as a full-time legal chairman at the local Berlin labour tribunal.

Although the political and social significance of the decisions of the new labour tribunals had already been examined in some detail in a short monograph by Franz Neumann,[122] the aim, methodology and conceptual framework of Kahn-Freund's study were original and his conclusions controversial and courageous. The study was original because it aimed, through a systematic analysis of the *RAG*'s decisions, to uncover the ideology behind the technical reasoning of the judiciary in the field of labour law. It was controversial because it concluded that the Court's social ideal was 'in all respects' (p. 151) identical to the social ideal of fascism. It was also highly courageous because not only was Kahn-Freund accusing his senior professional colleagues of applying fascist ideology in their decisions, but also because, at the time, the Nazi movement was growing in popular support and political influence and was increasingly employing terrorist methods against its opponents.

At the outset Kahn-Freund was at pains to stress that he was not attempting to relate the decisions of the *Reich* Labour Court or the term fascism to the 'actual conditions which exist in Italy or have existed there in any earlier period' (p. 110). His concern was with fascism as a system of ideas and not as a social reality, and his aim was to demonstrate the affinity between fascist ideology (as embodied in the new labour laws of Mussolini's Italy) and the 'social ideal' of the *RAG*. In fact, Kahn-Freund was exceptionally well-qualified to make this analysis, both in view of his mastery of the Italian language and legal materials and because of his intimate 'inside' knowledge of the relevant German case law.

What did Kahn-Freund understand by 'fascism' or the 'fascist social ideal'? He attempted to answer this question firstly by outlining the three systems of ideas which he claimed had previously 'dominated the social policy of the capitalist age, namely liberalism, social conservatism and collectivism' (p. 110), and secondly by comparing them with an 'ideal type' of fascist social policy.

(i) *Liberalism* – liberal social policy rejects all combinations and leaves the structuring of social relations to the free play of social and economic forces.

(ii) *Social Conservatism* – social-conservative social policy also rejects collective organisation, but it does place the individual under the social

protection of the state and the employer. This approach was adopted by Bismarck, and in a modified form by successive governments between 1890 and 1914.

(iii) *Collectivism* – collectivist social policy leaves the structuring of social relations largely to the organisations of capital and labour, and the state plays no major role in regulating the conflict between them. This was the social ideal underlying the collective labour law of Weimar Germany.

According to Kahn-Freund fascism borrowed elements from all three systems, particularly from social conservatism (the prohibition of industrial conflict, social protection for the individual, and commitment to the 'national interest') and collectivism (the recognition of collective organisations of employers and employees and their capacity to conclude collective agreements on wages and conditions). However, fascism itself was something radically new, comprising three basic ideas: the primacy of the interests of national production; the maintenance of 'economic peace' and industrial discipline; and state welfare protection for the individual employee. The fascist social ideal could not therefore be crudely characterised as 'pro-employer'; it was, argued Kahn-Freund, more complex than that. The rest of the study was concerned with demonstrating the complexity and the unity of the social ideal of the *RAG* by a detailed examination of its case law, which Kahn-Freund ordered under four main headings.

The first area of case law concerned 'the regulatory intervention of judicial decisions in collective conflict'. This was illustrated most clearly in the *RAG*'s re-interpretation of the roles of the works councils and the trade unions. Works councils were no longer regarded as bodies to represent the interests of employees at the level of the plant or 'works' (*Betrieb*), but as the custodians of the 'works objective' (*Betriebszweck*), a legal fiction which was never differentiated from the interests of the employer. The Court also re-defined the basic function of trade unions in terms of the promotion of industrial peace 'in the interests of national production', which again, on Kahn-Freund's analysis, was to be equated in practice with the interests of the employers. By providing a wide interpretation of the 'good faith' provision (section 826) of the Civil Code (*BGB*), the Court was in effect arrogating to itself the task of determining the reasonableness and thereby the lawfulness of collective industrial action. In all its decisions regulating collective conflict, the judiciary was, Kahn-Freund argued, imposing its own 'external' criteria on what collectivist labour law had envisaged as the 'autonomous' sphere of social and economic relations.

The second area of case law which Kahn-Freund examined concerned

what he called 'the inner transformation of the individual employment relationship by judicial decisions' (p. 126). In this area, the Court elaborated a series of inter-related concepts, 'works bond', 'works risk', 'works community' and 'works discipline', all of which restricted the ability of the individual employee to assert his own interests in relations with management. The judges thus gave legal support to the permanent subordination of the employee under the command power of the employer, again in the interests of a 'fictional' third party, the 'works' (*Betrieb*).

The third area of case law was closely linked to the other two and was called by Kahn-Freund 'the individualistic idea of welfare provision in judicial decisions'. Having fundamentally undermined the collective and individual rights of workers, the Court proceeded to give due recognition to their state of dependence on the employer by encouraging a policy of welfare paternalism towards the individual employee. It also compelled employers to take a generous view of their statutory obligations towards their employees, particularly towards the weak, the vulnerable and the needy, such as older salaried employees, victims of war and production, and the severely disabled. Ironically, the very same idea which the Court advanced in order to justify the employer's obligation towards the individual employee, namely the 'works bond' (*Betriebsverbundenheit*), was used by the Court against the individual employee (including the severely disabled) to discourage him or her from participating in collective action against the employer.

The final area of case law discussed by Kahn-Freund was the arbitration system and the labour magistrature in Italy. While this section of the monograph seems to be based in part on a false assumption about the theoretical affinity between the 'dispute-resolving' system of arbitration in Britain and that of fascist Italy, the thrust of Kahn-Freund's analysis here was both consistent and clear. By supporting the idea that industrial conflict should be supplanted by state arbitration, the *RAG* was again demonstrating its fundamental ideological commitment to the suppression of collective autonomy.

What conclusions did Kahn-Freund draw from this analysis? Firstly, and, in retrospect, rather naively, he demanded that the *Reich* Labour Court should in future be more open about the political nature of its decisions and admit that it was pursuing a distinct socio-political objective. Secondly, he noted that all civil service bureaucracies tend to regard conflict as abnormal, and that therefore the members of the state judicial service would feel a natural affinity for the fascist social ideal. Thirdly, he argued that the decisions of the *Reich* Labour Court had fundamentally transformed the basic character of collectivist labour law,

an idea he was to pursue in more detail in his subsequent article, *The Changing Function of Labour Law*. Fourthly, and for Kahn-Freund most importantly, he claimed that certain trends and developments within the proletariat and the labour movement were encouraging psychological conditions favourable to political dictatorship. The trade unions had connived at their own loss of autonomy by their inevitable participation in a series of public and semi-public agencies such as arbitration committees, labour tribunals and social insurance bodies. They had been unable to win the support of those occupational groups who were most susceptible to fascist ideology, that is, salaried employees and civil servants. Above all, they had contributed to a general de-politicisation in society and a lack of working-class militancy by their preoccupation with purely economic objectives and with social policy.

Kahn-Freund ended his monograph on a memorable and prophetic note: 'There are many roads which lead to dictatorship. However, the most likely road to fascism in our social conditions is not through force, but through the veneration of peace and order, of discipline and welfare provision, and above all through the ideological integration of the organisations of struggle into a hierarchically-ordered national community' (p. 155).

The Changing Function of Labour Law

Kahn-Freund wrote this article for the most prestigious sociological journal in Germany, the *Archiv für Sozialwissenschaft und Sozialpolitik (Archive for Social Science and Social Policy)*. It did not receive as much publicity as the monograph, but Kahn-Freund always regarded it as a more polished piece of writing and as his 'obituary notice' (p. 198) to the Weimar system of labour law. His aim was to demonstrate that, between 1918 and 1931, the function of labour law had changed from support for autonomous collectivism to the suppression of industrial conflict in the cause of order and social harmony. Following the conceptual approach of Sinzheimer and Renner, he was concerned with socially created rules of behaviour as well as legislative, judicial and administrative regulation, and his method was that of the sociology of law, whose task he defined as 'the portrayal of the relation between legal norms and social reality' (p. 162).

He began by giving a brief outline of the development of employment legislation in Germany before 1914, which he characterised as a 'mixture of liberal-individualist and conservative-welfare legal ideas' (p. 166). However, he also noted the increasing importance of socially created and enforced norms of behaviour in determining terms and conditions of employment; in fact, 'these extra-statutory norms were often more

important than legislation... The state played virtually no role in securing their acceptance' (pp. 166–7).

In 1918–19 a 'temporary state of equilibrium in the balance of power between the bourgeoisie and the working class' provided the extra-legal basis for the establishment of a new, 'collectivist' system of labour law, whose main elements Kahn-Freund then proceeded to describe. Although the Weimar Constitution did not contain a positive guarantee of the right to strike, it did provide for freedom of association and recognition of the associations and their agreements. Under the Decree of December 1918 the state gave legal support to collective agreements by providing for their immediate and compulsory effect upon all relevant contracts of employment, and by establishing the principle of 'extension'. Works councils were also given statutory recognition and, under the law of 1920, wide powers of joint consultation and co-determination at plant level. In addition, the autonomous associations were given statutory rights of nomination to a number of semi-public bodies and institutions concerned with industrial relations and social policy (*Sozialpolitik*), including arbitration committees, labour tribunals and social insurance and employment bodies.

What were the historical preconditions and underlying assumptions of collectivist labour law? Kahn-Freund gave a characteristically incisive and cogent answer:

> The socio-political system of collectivism is characterised by a particular attitude of the state towards the class struggle. The legal system does not negate the class struggle or suppress it, but it does not allow it unlimited freedom; rather it attempts, within the framework of the capitalist system, to determine the way it is conducted by the establishment of legal norms and, over and above this, to utilise the results of each individual stage of conflict for the further development of the law ... The basic presupposition of the collectivist system is the existence of a certain degree of equilibrium between employers and employees. Only as long as the mutual relations of the two groups remain in this state of equilibrium can the conflict between them be incorporated meaningfully into the legal system and used for its ends. Advances in social policy, the outcome desired by the state, can only arise out of the conflict between the two adversaries as long as the general economic and social situation allows each of the two groups to engage in conflict and does not make one of the two so superior in strength that it can refuse to conclude a peace agreement with the other. (below, p. 172)

In short, the collectivist system laid down procedural rules for the conduct of industrial relations and recognised the dynamic norm-creating

function of collective conflict as the basis for the establishment of new legally effective rules.

However, in comparing the theory of collectivism with the reality of Weimar Germany, Kahn-Freund expressed two basic doubts about its viability and effectiveness. Firstly, the system was innately unstable and fragile. It had emerged initially as a compromise between the interests of capital and labour during a 'temporary state of equilibrium in the balance of power': both employers and trade unions regarded it therefore as a 'transition stage'. For the labour movement it was simply one of the roads to the total seizure of power. For the employers it was a temporary position of retreat, which they were determined to reverse at the earliest opportunity. Secondly, and historically more important, the economic weakness of the trade unions in Weimar Germany undermined the basic premise of collectivism, that the conflict between employers and employees was one 'between parties of potentially equal strength with potentially equal opportunities':

> it goes without saying that inside the capitalist economic system there exists a natural disequilibrium in favour of the employers' side through their ownership of the means of production and their control of jobs. Where the demand for labour is very great, the employees' side can redress the balance, temporarily and to a certain extent, by means of industrial action. This counterbalancing process becomes impossible when, in times of crisis, the strike weapon is blunted by the over-supply of labour. (below, p. 172)

Kahn-Freund then proceeded to relate his general theory of collectivism to specific developments in collective bargaining and the system of works councils. He examined four facets of the changing balance between autonomous collective bargaining and state intervention, namely the arbitration system, the role and ideology of the judiciary, the 'extension' of collective agreements and the growth of state wage determination and emergency decrees (1930–2). Kahn-Freund's analysis of the judiciary, which must surely rank as one of the classic statements of socio-legal literature, focused on the way in which legal reality could be changed while written law remained unaltered. He was able to demonstrate that the *Reich* Labour Court had played a crucial role in reversing the relationship between the state and the collective organisations as laid down in the theory of collectivism:

> the state no longer leaves a large area of working life to the autonomous regulation of the organisations, intervening only to assist them in achieving their objectives; on the contrary the organisations enter

> into the service of the state in the very process of carrying out their autonomous role. They become public institutions... Thus, the *Reich* Labour Court regards the power to conclude collective agreements not as an expression of state policy to affirm the class struggle and to endorse its outcome at any given time, but as a conscious attempt by the state to use the organisations to carry out its own social policy objectives ... State intervention has been taking place in this area through judicial interpretations of the law in a way which is no longer compatible with the basic principles of the collectivist system. (below, pp. 170, 179)

The other main area in which Kahn-Freund examined the interaction between statutory provisions, judge-made law and social reality concerned the system of works councils. According to the Law of 4 February 1920 (*BRG*), the works councils were assigned both a representative (social policy) and a collaborative (economic policy) function: they had both to represent and safeguard the interests of the workforce vis-à-vis the employer, and also to co-operate with the employer in the interests of the 'works objective' (*Betriebszweck*), that is, in the interests of the company. Kahn-Freund emphasised that, at the time the legislation was passed, the economic policy function was regarded as but one element of a general transition from a capitalist to a socialist society and hence the 'works objective' was defined explicitly in macro-economic terms, not in terms of the profit interest of the entrepreneur or shareholders. The original intention was that the government and the regional and national 'economic councils' (*Wirtschaftsräte*) would elaborate an integrated national economic plan, and each 'works' would be assigned an 'objective' within it. In reality, of course, the socialisation of the economy did not occur, the economic councils were still-born, and the macro-economic framework of the 'works objective' was never established.

However, the economic policy function of the works councils continued to exist under statute law, and since it had not been defined in social practice, the judges were free to give their own interpretation of it. In fact, they proceeded to define it as a 'higher third interest', to which the interests of employers and employees were to be subordinated. As Kahn-Freund pointed out, the 'works objective' thus became identical with the interests and objectives of the employer. In effect, the judges were attempting to emasculate the representative function of the works councils and simultaneously to underline their autonomy from the trade unions whose main 'objectives' transcended any particular plant or company.

This whole trend in judicial decisions was anathema to Kahn-Freund,

who regarded the works councils as representative bodies and as the 'extended arm' (p. 89) of the unions. For him, the purpose of the 1920 Act was to promote the collectivisation of employment relations at the level of the *Betrieb*, that is, the plant and, by extension, the company. His viewpoint was consistent not only with the overall collectivist ethic of Weimar labour law, but also with the express provisions of the statute. According to the Law of Works Councils (*BRG*), collective agreements (*Tarifverträge*) concluded on a geographical or industrial basis had priority over works agreements (*Betriebsvereinbarungen*) concluded at plant level (*BRG* s. 66(5) and 78(2)(3)), and trade unions, as 'occupational associations', were given precedence over works councils (*BRG* s. 8).[123]

Kahn-Freund castigated the Court's interpretation of the works objective as a supreme example of reification. Out of the workers' right to participate in the management of their companies, conceived as a transitional measure in a general move towards the socialisation of the economy, the judges had created a restriction on the aspirations of the workers in the interests of the 'works', 'which was and is in reality nothing more than another name for the interests of the entrepreneur. Thus what was originally intended as a starting point for the socialisation of the economy became a limitation on collectivism' (p. 186). From the late 1920s onwards, the entire system of legal support for collective organisation and collective bargaining (including arbitration and even the 'extension' of collective agreements) was being transformed into its opposite: it now had the effect of damaging collective autonomy and destroying the incentive to join trade unions. The widening ideological divide between manual, white-collar and civil service employees only served to reinforce this trend. Imposed order through interventionist state regulation appeared to be replacing collectivism and the relatively free expression of class conflict.

Was this profoundly pessimistic and critical analysis correct? At the time, the conventional answer would have been negative. The more publicised monograph of 1931 was rejected as a misleading piece of propaganda, not only by the legal establishment, but also by the trade unions. This was hardly surprising, since the unions were becoming ever more dependent on a system of labour law which, on Kahn-Freund's thesis, was assisting them to their own destruction. This was particularly true of one of the show-pieces of 'unified' Weimar labour law, the new system of labour tribunals. As Martiny has argued: 'The fundamental reason behind the trade union demand for an independent system of labour tribunals was their firm conviction that it would lead to a permanent strengthening of their collective power. Kahn-Freund showed

clearly, however, that the exact opposite had happened, indeed more, that the trade unions had in fact weakened their capacity for action and thus lost legitimacy in the eyes of their membership'.[124] To the embattled officials of the SPD and the trade unions, who were at the time being pilloried from all sides for their policy of 'toleration' towards the authoritarian Brüning regime (1930–2), Kahn-Freund's critique must have seemed too close to that of the hated KPD. Clemens Nörpel, the leading specialist on labour law in the ADGB, was particularly vitriolic in his response, and even tried to enlist the support of Sinzheimer, Flatow, Fraenkel and Neumann to suppress the publication of the *Social Ideal of the Reich Labour Court*; we reproduce in Appendix 5 the remarkable exchange of letters between Nörpel and Kahn-Freund.

Today, there can be little doubt that Kahn-Freund's analysis was substantially correct. It was vindicated within a very short space of time by the tragic spectre of union leaders kowtowing to Hitler and participating in his May Day celebration, which was the immediate prelude to the total destruction of the German labour movement.

Kahn-Freund's condemnation of the attitude of the judiciary was equally forthright. Like the other professional elites in the army, the higher civil service, the universities and industry, the judges came mainly from a 'conservative-bourgeois milieu',[125] and had refused to adapt to the loss of the War and, in its aftermath, the establishment of a full political democracy and the consolidation of the political influence of the labour movement. Although they considered themselves to be above politics, they inevitably inclined towards the conventional political attitudes of the German bourgeoisie of the period, which embraced a mixture of authoritarianism, nationalism and anti-semitism together with a strong antipathy towards socialism, trade unionism and the whole democratic political system of the Weimar Republic. This did not mean that the judges were conscious Nazis, though some of them were, but it helped to explain their consistent bias on any legal issue touching on class relations. The attitude which Kahn-Freund detected in cases on labour law was no less apparent in constitutional and administrative law, and it was at its most blatant in criminal cases with political overtones. Time and again, right-wingers who committed political violence, including murder, were acquitted or received token sentences, whereas left-wingers were severely punished.[126] 'In the centre of the counter-revolution', wrote Franz Neumann in the 1940s, 'stood the judiciary',[127] and although today we might use other terms, perhaps 'authoritarian social conservatism', to describe the ideology of the Weimar judiciary, Kahn-Freund's polemical use of the term 'fascist' to characterise their

'social ideal' (not their conscious political commitment) seems remarkably apposite. In fact, most of the judicial personnel were to continue in their posts after 1933,[128] and many played an important role in legitimating the Nazi regime. Moreover, many of the most eminent professors of law were soon to become enthusiastically involved in suppressing the work of all 'neo-Jewish legal-professorial rabbis'[129] (such as Ehrlich, Lotmar, Sinzheimer and many others); this development prompted the exiled Sinzheimer to write his powerful book on the outstanding contribution of Jewish scholars to the entire field of German law.

Kahn-Freund was more ambivalent, however, on the lessons to be learned from the Weimar experience about the nature of collectivist labour law and its chances for success in the future:

> Perhaps it was a mistake to believe that it was possible to realise a collectivist system in a capitalist economy, without recognising that the economic conditions of capitalism allow this system to function only under quite specific circumstances. It was inevitable that the function of collectivism would change fundamentally when confronted by the crisis. ... Is it possible to legalise the class struggle in a class-divided society and to make it a component of the legal system? Can the state recognise the idea of class and yet remain 'neutral'? Must not the conflict eventually break up the legal system or the legal system suppress the conflict? It is impossible to answer these questions from the perspective of the present crisis. Only a renewed strengthening of the organisational power of the working class when the economy starts to grow again can teach us whether the collectivist system can achieve new life in a different economic situation. (below, pp. 176, 190–1)

The Weimar Legacy

Otto Kahn-Freund made a unique and permanent contribution to the development and understanding of comparative law, private international law, family law and particularly labour law. As Professor Simitis, one of the leading contemporary West German academic lawyers, has written: 'More than almost anyone else, he has influenced the development of labour law far beyond the borders of one country: it is also difficult to think of anyone who has exercised such a lasting influence on the aims and substance of so many other areas of law'.[130] It would go beyond the framework of this study to give a comprehensive evaluation of the

impact of Kahn-Freund's Weimar experience and writings on his later life and work. We would nevertheless like to attempt a brief assessment of some of the ways and some of the areas in which the 'Weimar legacy' influenced Kahn-Freund's subsequent contributions to the academic and legislative development of labour law.[131]

There are substantial links and continuities between the legal framework of industrial relations in Weimar and post-war Federal Germany, most obviously in areas such as the legal effect of collective agreements, the priority of collective agreements over works agreements (now unambiguously recognised), the system of works councils, the co-determination rights of employees (now extended) and protection against dismissal. But it was not really until the middle of the 1960s that the radical critique of Weimar labour law was revived in West Germany. The writings of Kahn-Freund, Neumann, Fraenkel and, of course, Sinzheimer, were rediscovered by a new generation of scholars and, through them, by the trade union and labour movement. Professor Däubler's major critique of the case law of the Federal Labour Court (*Bundesarbeitsgericht*) consciously invoked Kahn-Freund's analysis, in its aims, method and even in its title (*The Social Ideal of the Federal Labour Court*),[132] and it received the same kind of negative response from the judiciary and academic lawyers as Kahn-Freund's monograph of 1931. Professor Thilo Ramm, a critic of the decisions of the Federal Labour Court since the early 1960s, has also detected a continuity in the role and ideology of the German judiciary and even suggested that the 'integrationist' tendency of the West German trade unions after 1949 can be partly explained by the loss to German labour law in 1933, through liquidation and exile, of many of its left-wing practitioners and academics.[133] For Ramm and many other West German labour lawyers, then, Kahn-Freund's early writings are of more than historical significance.

The main focus of our interest, however, is that these writings provide a clear and fascinating indication of the richness and complexity of experience which, as an already accomplished academic and jurist, Kahn-Freund carried over to the study of labour law in Britain. His enforced exile, multi-lingual facility and intimate knowledge of both civil law and Anglo-American common law enabled and encouraged him to become a formidable comparative lawyer, 'universally acclaimed as the world's leading scholar of comparative labour law'.[134] But he was also heir to two powerful European intellectual traditions, the Austro-German school of sociological jurisprudence (Ehrlich, Ihering, Renner) and multi-disciplinary, historical social science, of which Marx and Weber were the two outstanding representatives. In short, Kahn-Freund was a comparative lawyer who was able to theorise. Whereas 'most

British lawyers saw labour law darkly through distorted spectacles of a case-law that concentrated primarily on categories of tort and contract', Kahn-Freund in the 1940s and 1950s 'gradually elaborated a conceptual framework which began to make some sense of the pattern of British labour law'.[135]

Much of this framework was in fact traceable to Hugo Sinzheimer, who had insisted on the need to cross traditional disciplinary boundaries and shown a constant awareness of the historically changing social and political realities which provide the substratum of any system of law. Sinzheimer had also personified in his own life and work the unity of academic scholarship and ethical conviction, and this was perhaps the most lasting influence of the 'Weimar legacy' on Kahn-Freund's intellectual activity in the period after his exile to Britain: 'in the late 1920s and early 1930s in Germany, it was inevitable that intellectuals were deeply involved in political debate. They had to question the implications of what they were doing and relate it to the wider issues facing German society. Kahn-Freund brought this sense of political realism with him to England.'[136]

There are many specific ways in which the unique quality of Kahn-Freund's writings on British labour law stem directly from his Weimar experience. He characterised the individual contract of employment, the conceptual cornerstone of British labour law, as a 'command under the guise of an agreement'.[137] If the law was to play a role in regulating the employee's situation of dependency on the employer, then it had first, as Sinzheimer had argued, to recognise that the employment relation was one of domination and subordination. This insight inspired Kahn-Freund's articulation of the 'subordination' or 'organisation' (as opposed to the traditional 'control') test of the employment as distinguished from other forms of contract; subsequently, the 'organisation' test was accepted in some cases as part of the common law.[138] Kahn-Freund's sociological interpretation of the employment relationship also had a crucial influence on his definition of the overall purpose and function of labour law:

> Law is a technique for the regulation of social power . . . the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment'. The main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent in the employment relationship.[139]

Turning to trade union law, Kahn-Freund provided the classic analysis of the application of the restraint of trade doctrine to trade union rules and objects.[140] Steeped in a sociological approach to labour law, he was able to relate the subtle changes in judicial policy on trade union legality to the parallel changes in the general political and social climate and to the broad sweep of comparative historical development. He also invoked the concepts of repression, toleration and recognition, which were in common usage in the Weimar period as an aid to understanding the successive phases in the development of relations between the state and the trade unions in Germany, in order to help explain the historical evolution of labour law to the British reader. But his most important contribution in the 1940s and 1950s was unquestionably in the field of collective bargaining law.[141]

In 1943, Kahn-Freund published an article of seminal importance in which he introduced Sinzheimer's classification of the functions of collective agreements into the analysis of British labour law.[142] Agreements, he argued, have a dual function: to codify terms and conditions of employment, the 'normative' aspect, and to lay down the mutual obligations of the collective parties, the 'obligatory', peace treaty or contractual aspect. At this stage, Kahn-Freund assumed that the contractual function found legal expression (as it had in Weimar Germany) in the enforceability of collective agreements as contracts. Subsequently, he developed his analysis of how the collective 'lawmakers'[143] agreed normative codes, 'crystallised custom',[144] and of how the state intervened selectively in order to achieve a compulsory normative effect.[145] But in the late forties and fifties his analysis of the contractual function was to be revolutionised rather than refined by his insight that British collective agreements were not, after all, contracts in the legal sense:[146]

> The true reason for the complete absence of any attempts legally to enforce the mutual obligations created by collective agreements can, in the writer's opinion, only be found in the intention of the parties themselves. An agreement is a contract in the legal sense only if the parties look upon it as something capable of yielding legal rights and obligations. Agreements expressly or implicitly intended to exist in the 'social' sphere only are not enforced as contracts by the courts. This appears to be the case of collective agreements. They are intended to yield 'rights' and 'duties', but not in the legal sense; they are intended, as it is sometimes put, to be 'binding in honour' only, or (which amounts to very much the same thing) to be enforceable through social sanctions but not through legal sanctions.[147]

Kahn-Freund's grounding in German legal sociology was the key to this

supremely important discovery about the central institution of British industrial relations. Unlike British lawyers, who chose by and large to ignore the whole phenomenon of collective bargaining, Kahn-Freund followed Sinzheimer's example and studied actual collective agreements. At a more theoretical level, his knowledge of Ehrlich's analysis of 'living law' assisted him in articulating the fundamental question as to whether autonomous collective regulation could be enforced entirely through social sanctions.

The theory of the non-contractual status of collective agreements was one of Kahn-Freund's outstanding achievements. Inevitably it featured in the development of the common law[148] and in the political and legislative controversies of the last decade and a half.[149] It was to be a central plank of his analysis of 'legal abstention'[150] and hence of the 'tradition of voluntarism'[151] in British industrial relations.

'Legal abstention' was a striking, if not unproblematical, description of the comparatively non-interventionist nature of British labour law in the fifties and sixties.[152] Kahn-Freund's theme of the clash between the judiciary and progressive legislation in Weimar Germany provided an obvious analogy for his incisive analysis of British strike law, which took the form of immunities granted by Parliament from judge-made liabilities. This structure was intended to legislate judges out of industrial conflict, and the general implication of legal abstention was that state intervention in industrial relations should be kept to a minimum. With the major exception of health and safety matters, statutory regulation, even of the individual contract of employment, was conspicuous by its absence. Kahn-Freund explained this development by reference to the fact that the industrial power of the British labour and trade union movement preceded and exceeded its political organisation and influence, just as Ernst Fraenkel had earlier traced the reliance of the unions in Weimar Germany on state policy and legislation to their relative political strength and economic weakness.[153] In Britain, then, it appeared that the employment relationship was governed not by law but by the voluntary rules of autonomous collective organisations.

For Kahn-Freund, legal abstention was not only an empirical fact, it was part of an ideological commitment to 'collective laissez-faire', to a belief in the virtues of pluralistic group autonomy through collective conflict and bargaining. This critical emphasis on the priority of voluntary institutions in Britain was a natural observation and value judgment for someone with Kahn-Freund's background. Given his earlier critique of the dangers of legal intervention in the Weimar Republic, he could only have been deeply impressed by the contrast between the futility of legalistic formulae in the face of economic disaster, bitter class conflict

and the eventual triumph of fascist totalitarianism in Germany, and the British situation where democracy and relative social peace and stability, at least from the forties onwards, appeared to rest on the solid foundations of strong voluntary institutions. In all his writings, Kahn-Freund was consistent in stressing that the law could only play a secondary role in regulating human behaviour and advancing human welfare:

> the law can only make a modest contribution to people's standard of life ... I regard law as a secondary force in human affairs, and especially in labour relations ... The law does, of course, provide its own sanctions, administrative, penal, and civil, and their impact should not be underestimated, but in labour relations legal norms cannot often be effective unless they are backed by social sanctions as well, that is by the countervailing power of trade unions and of the organised workers asserted through consultation and negotiation with the employer and ultimately, if this fails, through withholding their labour ... As a power countervailing management the trade unions are much more effective than the law has ever been or can ever be.[154]

For these reasons, Kahn-Freund was critical of the Conservative government's Industrial Relations Act of 1971, and he interpreted its failure as 'a sign that the law just cannot abrogate that which is a deeply rooted attitude, that its power as one of the forces motivating industrial behaviour is severely limited, and that, however sovereign Parliament may be in law, its law making power is, in the sociological sense, circumscribed by the social environment for which it seeks to legislate'.[155] However, there were a number of ways in which Kahn-Freund came to modify the criticisms he had made of the pluralistic collectivism of Weimar Germany.

While the younger Kahn-Freund had questioned the basic assumption of Weimar collectivism, namely that in a capitalist society there is a degree of equilibrium in the balance of power between employers and employees, the mature Kahn-Freund came to develop, from the 1950s onwards, a less radical variant of 'pluralist' philosophy located in the mainstream of liberal political thought in post-war Britain. He still accepted the inevitability of industrial conflict, but he now argued that it was 'legitimate' only within the institutions of collective bargaining, that is, on issues which were amenable to settlement through negotiation and compromise. Clearly, the conviction he held in 1932 about Weimar collectivism, that it was only a 'transition stage' to a different kind of social and economic system, was no longer felt to apply to the pluralist society of post-war Britain. If before 1933 he had regarded capitalist

ownership and control as the determining factor in industrial relations and industrial conflict, he later argued that the divergency of interests between employers and employees was common to all societies, whether capitalist or communist: 'management and labour' replaced 'capital and labour' as the basic contradiction in employment and work relations. Under the impact of full employment and increasing trade union membership and organisation, he also came to see labour law not only in terms of its original historical purpose (that is, the restraint and the regulation of the power of management), but also as a means of regulating the power of the trade unions: 'The principle purpose of labour law . . . is to regulate, to support and to restrain the power of management *and* the power of organised labour'.[156]

This re-definition of the function of labour law underlay Kahn-Freund's contribution to the work of the Donovan Royal Commission; it also helps to explain his advocacy in the late sixties of a strengthening of the 'legal framework' to encourage the restoration of peace and order in British industrial relations. These aspects of Kahn-Freund's work have been critically assessed elsewhere.[157] But it is important to stress that, in this final phase of his career, Kahn-Freund's ultimate aim remained the same as in the Weimar Republic, to preserve and promote the principle of collective autonomy.

There was one final area in which Kahn-Freund's analysis was, as he himself acknowledged, influenced decisively by the 'Weimar legacy', namely industrial democracy. This had become a major political issue in 1977 with the publication of the Report of the Bullock Committee of Inquiry,[158] which recommended the introduction of trade union representation on the boards of large private companies. Kahn-Freund quickly entered the debate with an article which was highly sceptical of these proposals. He claimed that such representation might well prejudice the clear divide between the functions of management and unions, and he consciously revived part of his critique of the decisions of the *Reich* Labour Court in support of this argument. He asserted that Bullock had 'reified' the interests of the company, that is, it had assumed the existence of a 'self-perpetuating entity, the company or the enterprise, whose "interests" transcend those of any of its component elements', whereas in reality there was a basic conflict of interest, in which 'the company's interests may be opposed to those of the workers in a sense which they cannot be opposed to the shareholders'.[159] However, the young Kahn-Freund's condemnation of the judicial tendency to reify the 'works objective' was in opposition to a system which was eroding the power and the independence of the German trade union movement, whereas the apparently similar argument in the 1970s was perhaps in

part a reflection of his growing disenchantment with some of the practices of British industrial relations and British trade unionism.[160]

At the end of his essay commemorating the hundreth anniversary of the death of Hugo Sinzheimer, Otto Kahn-Freund remembered his great friend in words which could equally apply to himself: 'The ultimate motivating factor was his active sense of justice ... His ideas had a decisive influence on the life and work of his pupils. No-one could fail to be affected by the power of his words, and everyone was warmed by the fire of his will to social justice and the emancipation of man ... But the inspiration came, as with all of us, in his youth.'[161]

Notes

1. The literature in English on Kahn-Freund's life and work consists of: K.W. Wedderburn, 'British Labour Law and Otto Kahn-Freund: 1971' and T. Ramm, 'German Labour Law and Otto Kahn-Freund', both in *Industrial Law Society Bulletin*, No. 11, September 1971 (an edition dedicated to Kahn-Freund on his retirement from Oxford); T.M. Partington's 'Introduction' to *O. Kahn-Freund: Selected Writings* (1978); *The Times* (Obituary) 6.11.79; Lord Wedderburn, 'Professor Sir Otto Kahn-Freund' and R. Lewis, 'Collective Agreements: The Kahn-Freund Legacy', both in *Modern Law Review*, 42 (1979) 609 and 613; B.A. Hepple, 'Sir Otto Kahn-Freund, Q.C., F.B.A. 1900–1979', O. Kahn-Freund, 'The Study of Labour Law – Some Recollections', and R. Lewis, 'Kahn-Freund and Labour Law: An Outline Critique', all in *Industrial Law Journal*, 8 (1979) 193, 197 and 202 (a 'memorial' issue marking Kahn-Freund's death).
2. *Royal Commission on Trade Unions and Employers' Associations 1965–8, Report* (1968). Kahn-Freund's major writings on labour law include 'Legal Framework', in A. Flanders and H. Clegg (eds.), *The System of Industrial Relations in Great Britain* (1954) (for many years the definitive modern statement of British labour law); 'Intergroup Conflicts and their Settlement', *British Journal of Sociology*, 5 (1954) 193 (legal policy in a sociological framework); 'Labour Law', in M. Ginsberg (ed.), *Law and Opinion in England in the Twentieth Century* (1959) (exposition of the theory of abstentionist' labour law); (ed.), *Labour Relations and the Law – a Comparative Study* (1965); *Labour Law: Old Traditions and New Developments* (Toronto, 1968); *Labour and the Law* (1972, 2nd ed. 1977) (standard work on collective labour law with strong comparative perspective); *Selected Writings* (1978) (collection of English writings demonstrating his technical range – family, company, transport and private international as well as labour law – and his use of historical, sociological and comparative studies; includes full bibliography); *Labour Relations: Heritage and Adjustment* (1979).

3. O. Kahn-Freund, 'Hugo Sinzheimer 1875–1945', introduction to Hugo Sinzheimer, *Arbeitsrecht und Rechtssoziologie* (*Labour Law and the Sociology of Law*). Collected essays and speeches in two volumes, edited by O. Kahn-Freund and T. Ramm (1976), Volume 1, pp. 1–31. This essay is reprinted in English translation in the present book, pp. 73–107. Henceforth, the two-volume edition of Sinzheimer's shorter writings will be cited as Sinzheimer (1976), followed by the volume and page numbers.
4. Published in 1928 as *Umfang der normativen Wirkung des Tarifvertrages und Wiedereinstellungsklausel* (Berlin). Kahn-Freund's other major 'technical' as opposed to 'theoretical' labour law publication in the pre-1933 period was G. Flatow and O. Kahn-Freund, *Betriebsrätegesetz vom 4 Februar 1920* (*Law of Works Councils of 4 February 1920*), 13th ed. (1931), in which he assisted Flatow, the original author, in the preparation of a revised edition of what was the leading commentary on the Law of Works Councils.
5. See O. Kraines, *The World and Ideas of Ernst Freund* (1974). The major works of Ernst Freund (1864–1932) include: *The Police Power: Public Policy and Constitutional Rights* (1904); *Cases on Administrative Law Selected from Decisions of English and American Courts* (1911, 2nd ed., 1928); *Standards of American Legislation: An Estimate of Restrictive and Constructive Factors* (1917); *Administrative Powers over Persons and Property: A Comparative Study* (1928); *Legislative Regulation: A Study of the Ways and Means of Written Law* (1932).
6. See Kraines (1974), p. 143.
7. Labour law has been taught at the London School of Economics since 1903; in the 1920s, Robson's course included elements of comparative and 'collective' as well as 'individual' labour law. See generally K.W. Wedderburn, *British Report to the 6th International Congress of Labour Law and Social Security* (1966).
8. Ernst Fraenkel was born in 1898, studied law at the Universities of Frankfurt-am-Main and Heidelberg, and was awarded his doctorate in 1924 for a thesis on the contract of employment, written under Sinzheimer. He was an advocate at the Prussian Supreme Court in Berlin from 1927 until 1938, when he emigrated to the USA. There he published *The Dual State: A Contribution to the Theory of Dictatorship* (1941). He was appointed Professor of Political Science at the Free University of West Berlin in 1953. Franz Neumann was born in 1900, and studied law at the Universities of Leipzig, Rostock and Frankfurt-am-Main. He was awarded his doctorate in 1923 with a thesis on the relation between the state and punishment. He was a lecturer and practising advocate from 1925 until 1933, and legal adviser to the SPD and the socialist Metalworkers' Union. In 1933, he fled to England, studied at the LSE, and was awarded his Ph.D. in 1936 for a thesis on *The Governance of the Rule of Law*, written under the supervision of Harold Laski. He emigrated to the USA in 1936, where he wrote his classic study of Nazi Fascism, *Behemoth* (1942). In 1950 he was appointed

to a professorship at Columbia University, New York, and died in September 1954 as the result of a car accident in Switzerland. This information is taken from T. Ramm (ed.), *Arbeitsrecht und Politik* (*Labour Law and Politics*) (1966), which brings together the main Weimar labour law writings of Fraenkel, Kahn-Freund, Neumann and Heinz Potthoff, a labour law expert who was a contemporary of Hugo Sinzheimer. Henceforth, this book will be cited as Ramm (1966).

9. Ernst Fraenkel, 'Kollektive Demokratie' ('Collective Democracy'), *Die Gesellschaft*, 6 (1929) 103–18; 'Zehn Jahre Betriebsrätegesetz' ('Ten Years of the Law of Works Councils'), *Die Gesellschaft*, 7 (1930) 117–29; 'Die politische Bedeutung des Arbeitsrechts' ('The Political Significance of Labour Law'), *Die Gesellschaft*, 9 (1932) 36–48. Franz Neumann, *Die politische und soziale Bedeutung der arbeitsgerichtlichen Rechtsprechung* (*The Political and Social Significance of the Practice of the Labour Tribunals*) (1929). All these texts are reprinted in Ramm (1966).
10. T. Ramm, 'German Labour Law and Otto Kahn-Freund' (1971), p. 4.
11. *Das Soziale Ideal des Reichsarbeitsgerichts. Eine kritische Untersuchung zur Rechtsprechung des Reichsarbeitsgerichts* (*The Social Ideal of the Reich Labour Court – A Critical Examination of the Practice of the Reich Labour Court*) (1931). Reprinted in Ramm (1966), pp. 149–210. Published in English translation below, pp. 108–61.
12. 'Der Funktionswandel des Arbeitsrechts', *Archiv für Sozialwissenschaft und Sozialpolitik*, 67 (1932) 146–74. Reprinted in Ramm (1966), pp. 211–46. Published in English translation below, pp. 162–92.
13. Kahn-Freund upheld the appeal of the three technicians against dismissal for three main reasons. Firstly, the employer had failed to prove his claim that there was a direct correlation between membership of or sympathy with the Communist Party (KPD) and intent to commit an act of sabotage against the Radio Company. If this claim were to be accepted, then every German citizen who had voted Communist would be automatically under direct suspicion of committing criminal acts. Secondly, the Company had advanced no evidence in support of its claim that the technicians were in fact members or sympathisers of the KPD. Thirdly, the Radio Company did not have legal status as a 'political organisation', which would have made dismissal on political grounds a justifiable cause. In fact, as Kahn-Freund pointed out, the Weimar Constitution expressly forbade the use of the radio for party political reasons, and he felt sure that no one would wish to imply that the new *Reich* government had been guilty of breaking the constitution by making party-political broadcasts! The Court therefore ordered the reinstatement of the three technicians, and, in case the Company refused to take them back, it stipulated that they were to be paid the maximum possible compensation allowed under the law in accordance with their position and length of service. These details are taken from a copy of the judgment, 3a AC 137/33, Berlin Labour Tribunal, Chamber 3a, 14/3/1933, signed by *Amtsgerichtsrat* Dr Kahn-Freund. A copy of the judgment was kindly lent to the editors by Elisabeth Kahn-Freund.

14. Arthur Rosenberg, *A History of the German Republic* (1936), p. 1.
15. In 1909, for example, the conservative bloc in the *Reichstag* with under four million voters behind them was able to outvote the liberal and social democratic parties with nearly seven million voters. See Carl Schorske, *German Social Democracy 1905–1917* (1955), p. 150.
16. See O. Kahn-Freund, 'The Changing Function of Labour Law', p. 164.
17. The timing of the resignation of Generals Hindenburg and Ludendorff proved subsequently to have been extremely significant. By handing over the reins of government from the military to the *Reichstag* in the autumn of 1918, they left it to the new parliamentary government to proclaim the unconditional surrender of Germany and to conclude the Versailles Peace Treaty in 1919. This laid the foundation for the myth that the German nation and in particular the German army had been 'stabbed in the back' by the unpatriotic and weak forces of republican democracy. This myth proved to be one of the most important weapons with which to attack Weimar democracy, and later one of the central rallying points in the rise to power of Hitler fascism. See Erich Eyck, *A History of the Weimar Republic*, Vol. 1 (1967), pp. 122–8.
18. At this stage, the workers' councils were in no way intended to take the place of political parties or government: they were simply an alternative to the trade unions as a form of strike organisation. As Rosenberg commented: 'The fact that the Delegates' Conference at the time of the January strike designated itself a Workmen's Council must not be misinterpreted to mean that the delegates were inspired by a desire to arrogate to themselves a sort of governmental authority. This Workmen's Council was no more than the mouthpiece of the strikers; it took the place of the trades unions, and not of the *Reichstag*.' Arthur Rosenberg, *Imperial Germany – The Birth of the German Republic* (1964), p. 212.
19. Franz Neumann, *Behemoth* (1942), p. 20. The concept of collectivism and the agreement between the employers and the trade unions in November 1918 (the 'Stinnes-Legien Agreement') will be examined in more detail below.
20. See Rosenberg's comment: 'The High Command and the Generals had from the very beginning longed for a situation to arise in which they might at Ebert's command put down the radical workers'. Rosenberg (1936), p. 82.
21. See Appendix 4 for details on the strength of the main political parties in the *Reichstag*.
22. Declaration of the executive committee of the USPD, quoted from Rosenberg (1936), p. 102.
23. The exact wording of the Cabinet announcement was: 'No member of the Cabinet is considering or has ever considered including the councils' system in any form either in the constitution or in the apparatus of governmental administration.' Quoted from: Martin Martiny, *Integration oder Konfrontation? Studien zur Geschichte der sozialdemokratischen Rechts– und Verfassungspolitik* (1976), p. 94, n 211.

24. Reprinted in slightly different translation in Neumann (1942), p. 20, and Rosenberg (1936), p. 107. Much of this wording was later taken over and incorporated into Article 165 of the Weimar Constitution, which is reprinted in translation in Appendix 3. Article 165 will be analysed in more detail below.
25. Sinzheimer's role in the Constitutional Committee of the National Assembly has been examined in detail by Martiny (1976), pp. 85–99, and in this volume by Otto Kahn-Freund, 'Hugo Sinzheimer 1875–1945', pp. 86–91.
26. In the process of this destruction of the political power of the councils the SPD leadership lost a substantial amount of credibility among its traditional supporters in the labour movement. This was reflected in the election of June 1920, in which the SPD lost 61 seats while the USPD won 62. See Appendix 4.
27. Neumann (1942), p. 21.
28. Ibid., p. 38. Neumann actually defines pluralistic collectivism as 'the incorporation of the powerful social and economic organisations directly into the political system' (ibid.), but the use of the term 'incorporation' implies (at least nowadays) a degree of integration into the state which Neumann might not have intended.
29. See for example G. Fülberth and J. Harrer, *Die deutsche Sozialdemokratie 1890–1933* (1974), p. 166.
30. G. Braunthal, *Socialist Labor and Politics in Weimar Germany* (1978), p. 46.
31. R. Hunt, *German Social Democracy 1918–1933* (1970), p. 182.
32. For fuller details of the nine-point programme, see Braunthal (1978), p. 43.
33. Hunt (1970), p. 185.
34. Reprinted in translation in Appendix 3.
35. See H. Lethen, *Neue Sachlichkeit 1924–1932* (1970), pp. 20–5. Union leader Fritz Tarnow described Henry Ford at the time as the 'greatest revolutionary of the century', ibid., p. 22.
36. For a more detailed analysis of the inter-relation between economic and political developments in Weimar Germany, see H. Mommsen, D. Petzina and B. Weisbrod (eds.), *Industrielles System und Politische Entwicklung in der Weimarer Republik*, Vol 2 (1977).
37. Details about changes in electoral support between 1928 and 1932 have been taken from Alfred Milatz, 'Das Ende der Parteien im Spiegel der Wahlen 1930 bis 1933', in E. Matthias and R. Morsey (eds.), *Das Ende der Parteien 1933* (1960), pp. 743–93.
38. See E. Nolte, *Three Faces of Fascism* (1965); K.D. Bracher, *The German Dictatorship* (1971); R. Brady, *The Spirit and Structure of German Fascism* (1937); W. Reich, *The Mass Psychology of Fascism* (1975).
39. See Hunt (1970), pp. 129–30; O.K. Flechtheim, *Die KPD in der Weimarer Republik* (1969), p. 311ff. For details of the *Reichstag* elections see Appendix 4.
40. According to the Prussian 'Ministerial Director', A. Brecht, quoted by E. Matthias, 'Die Sozialdemokratische Partei Deutschlands', in Matthias and Morsey (1960), pp. 131–2.

41. O. Kahn-Freund, 'The Weimar Constitution', *Political Quarterly*, 15 (1944) 235. See on the attitude of the SPD leadership in these years, Matthias (1960), pp. 101–62.
42. See Siegfried Bahne, '"Sozialfaschismus" in Deutschland: Zur Geschichte eines politischen Begriffs', *International Review of Social History*, 10 (1965, Part 2) 211–45.
43. Wolfgang Abendroth, *A Short History of the European Working Class* (1972), p. 95.
44. Eyck (1967), Vol. 2, p. 434. The election losses of the Nazis in November 1932 were also greeted with great optimism outside Germany. Eyck quotes in particular the following extract (p. 441) from an article by Harold Laski, published in the Daily Herald on 19 November 1932: 'The day when they (the Nazis) were a vital threat is gone . . . Accident apart, it is not unlikely that Hitler will end his career as an old man in some Bavarian village who, in the *Tiergarten* in the evening, tells his intimates how he nearly overturned the German *Reich*. Strange battle cries will struggle to his lips; and he will mention names that trembled at his name. But his neighbours will have heard the tale so often that they will shrug their shoulders and bury their faces deeper in their mugs of Pilsener to hide their smiles. The old man, they will think, is entitled to his pipe-dreams.'
45. See on this aspect of the development of trade unionism and labour law in Germany, Wolfgang Däubler, *Das Arbeitsrecht* (1976), pp. 37–44.
46. The term 'free' trade unions achieved widespread currency in Germany in the 1890s as a shorthand for 'socialist' trade unions. The terms are henceforth used interchangeably.
47. See on the Christian trade union movement Braunthal (1978), pp. 26–7, 109–11.
48. See on the Hirsch-Duncker federation ibid, p. 26, pp. 111–12.
49. See Appendix D of Braunthal's book, where he publishes a table of trade union membership in Germany in 1931: Braunthal (1978), p. 192.
50. Quoted from Walter Kaskel, *Arbeitsrecht*, 4th edition revised by H. Dersch (1932), p. 7.
51. The figures are taken from Hunt (1970), p. 152, and, for 1890, D. Fricke, *Zur Organisation und Tätigkeit der deutschen Arbeiterbewegung 1890–1914* (1962), p. 208.
52. Hunt (1970), p. 151.
53. Quoted from Schorske (1955), p. 12.
54. Quoted from Hunt (1970), p. 160.
55. See for further details J. Rückert and W. Friedrich, *Betriebliche Arbeiterausschüsse in Deutschland, Großbritannien und Frankreich im späten 19. und frühen 20. Jahrhundert* (1979), pp. 25–7.
56. See Schorske (1955), p. 14. Details of the amounts paid to union members under these various categories from 1891–1914 are contained in Fricke (1962), p. 236.
57. See Martiny (1976), p. 76.
58. Däubler (1976), p. 40.

59. Quoted from ibid, p. 41. For a detailed study of the relation between the state, industry and the labour movement in this period see K. Saul, *Staat, Industrie und Arbeiterbewegung im Kaiserreich* (1974).
60. See Schorske (1955), pp. 257ff.
61. Quoted from Däubler (1976), p. 42.
62. Quoted from Neumann (1942), p. 330.
63. The basic material for this section on the development of the trade union movement from 1914–19 is taken from Schorske (1955), pp. 285–321, and Braunthal (1978), pp. 29–39.
64. Braunthal (1978), p. 35.
65. The Central Joint Labour Committee had little practical influence on national industrial and economic policy. It was boycotted by the Metal Workers' Union in October 1919 (this union was at the time under USPD control), and finally dissolved in 1924.
66. See Martiny (1976), pp. 94–9.
67. Figures are taken from Martiny (1976), p. 74, for 1913, and from Kuczynski (1966), p. 155, for 1919 and 1922.
68. See Braunthal (1978), p. 168.
69. See Fülberth and Harrer (1974), pp. 167–8.
70. These measures will be discussed in the next section and are also examined in the three translated writings. A short summary of their main provisions is contained in Appendix 2. The classic post-war study of Weimar social policy is by Ludwig Preller, *Sozialpolitik in der Weimarer Republik* (1978).
71. Quoted from M. Schneider, 'Tolerierung – Opposition – Auflösung: Die Stellung des ADGB zu den Regierungen Brüning bis Hitler', in W. Luthardt (ed.), *Sozialdemokratische Arbeiterbewegung und Weimarer Republik* (1978), Vol. 1, p. 151. This article contains a detailed examination of the policy of the ADGB towards the state in the 1930–3 period.
72. Quoted from Schneider (1978), p. 153.
73. See Braunthal (1978), pp. 70–4.
74. Schneider (1978), p. 157.
75. Quoted from Braunthal (1978), p. 81.
76. The two features of trade union organisation in Weimar Germany which cannot be traced back to the nineteenth century are the importance of civil service trade unionism and the role of communists in the socialist trade union movement. The 'free' trade union movement failed during the Weimar Republic to reach the vast majority of civil servants: in fact, the percentage of overall union membership of the socialist federation of civil servants, the ADB, declined between 1923 and 1932. Most civil servants who joined an occupational organisation in Weimar Germany were members of the German Federation of Civil Servants (DBB), which Bracher has called 'non-political' and 'anti-trade union', K.D. Bracher, *Die Auflösung der Weimarer Republik* (1955), p. 159. Communist policy towards the trade unions in Weimar Germany was both ambivalent and continually changing. At various times the KPD advocated the formation of separate communist unions, e.g. the 'Red Trade Union Opposition' (1929–32), and

in 1928–9 many of its trade union activists were expelled because of alleged 'right-wing opportunism'. By the end of 1931, 78% of the KPD membership was in fact unemployed, and so its influence in the organised trade union movement in the final years of the Republic was not significant. At the 20th Congress of Germany's largest socialist union, the Metalworkers, in August 1932, 272 of the 283 delegates were members or sympathisers of the SPD, and only two were members of the KPD. See Hanno Drechsler, *Die Sozialistische Arbeiterpartei Deutschlands (SAPD)* (1970), p. 296. For more details on the role of the KPD in Weimar trade unionism, see Braunthal (1978), pp. 102–4.

77. Braunthal (1978), p. 154.
78. See Neumann, *Die politische und soziale Bedeutung der arbeitsgerichtlichen Rechtsprechung* (1929), in Ramm (1976), esp. pp. 129–31.
79. See ibid., also Neumann (1942), p. 329ff.; Kahn-Freund, 'The Changing Function of Labour Law', p. 165. Neumann was almost certainly unaware that the 'recognition' phase in Britain had a peculiarly non-interventionist form, which Kahn-Freund was later to theorise. On this aspect of comparative legal-historical development, see Lord Wedderburn, 'Industrial Relations and the Courts', *Industrial Law Journal*, 9 (1980) 65. For a brief explanation in English of the background to collective labour law in Germany, see chapters 6 and 15 by Thilo Ramm in O. Kahn-Freund (ed.), *Labour Relations and the Law: A Comparative Study* (1965).
80. Martiny (1976), p. 73.
81. See Martiny (1976), p. 75. In 1903, the *Reich* Court held that a collective agreement was not binding: see Kaskel (1932), p. 48. But in 1910 an action for damages against a trade union for breach of a collectively agreed peace obligation was allowed: see Ramm (1965), p. 84.
82. Quoted from an article by Bernhard Schildbach in 1909 on collective agreements, cited by Martiny (1976), p. 78.
83. See Martiny (1976), p. 84, pp. 88–9.
84. See Fraenkel, 'Die politische Bedeutung des Arbeitsrechts' (1932), in Ramm (1966), esp. pp. 249–54.
85. See Kaskel (1932), p. 11.
86. The order imposing compulsory effect on arbitration awards was enacted as a result of pressure from the trade unions and against the strong opposition of the employers. According to Braunthal (1978, p. 153), the unions believed that, as the consistently weaker parties in collective bargaining, they would have more to gain from this measure than the employers. Subsequently, the 'order' was used by governments to impose wage cuts, a classic example of 'the changing function of labour law'. Däubler has argued that this aspect of the Arbitration Decree of 1923 was 'the first serious interference in the right to strike' in Weimar Germany: Däubler (1976), p. 43.
87. Martiny (1976), p. 107.
88. See Fraenkel, 'Die politische Bedeutung des Arbeitsrechts' (1932), in Ramm (1966), p. 253.

89. See on this area T. Ramm, 'Labour Courts and Grievance Settlement in West Germany', in B. Aaron (ed.), *Labour Courts and Grievance Settlement in Western Europe* (1971), pp. 83–7.
90. Ibid., p. 86.
91. All the articles reprinted in Ramm (1966) examine this point.
92. On the nature and importance of 'civil service ideology', see Bracher (1955) pp. 157–78. The judges in Weimar Germany were, in fact, recruited into the state judicial service and then pursued the career of state legal functionary.
93. Fraenkel, 'Die politische Bedeutung des Arbeitsrechts' (1932), in Ramm (1966), pp. 256–7.
94. Ibid., p. 258.
95. 'The Weimar Constitution' (1944), p. 231.
96. Fraenkel, 'Die politische Bedeutung des Arbeitsrechts' (1932), in Ramm (1966), p. 254.
97. O. Kahn-Freund, 'Hugo Sinzheimer 1875–1945', p. 95.
98. For example his chapter in Ginsberg (1959); *Labour and the Law* (1977); *Labour Relations: Heritage and Adjustment* (1979).
99. See the record of this event in *Hugo Sinzheimer – Gedächtnisveranstaltung zum 100. Geburtstag* (1977).
100. See Appendix 1 for a bibliography of the writings of Sinzheimer.
101. Martiny (1976), p. 85.
102. See ibid., p. 86.
103. See for details, H. and E. Hannover (eds.), *Politische Justiz 1918–1933* (1966), p. 199.
104. *IG Metall* President Eugen Loderer, quoted in *Hugo Sinzheimer – Gedächtnisveranstaltung* (1977), p. 19.
105. There was of course a more traditional and conservative school of labour law in Weimar Germany: see A. Hueck and H.C. Nipperdey, *Lehrbuch des Arbeitsrechts*, Vol. 1, 3rd ed. (1931), Vol. 2 (1930); E. Jacobi, *Grundlehren des Arbeitsrechts* (1927); W. Kaskel, *Arbeitsrecht* (1932). Cf. also the radical left-wing view of labour law in Karl Korsch, *Arbeitsrecht für Betriebsräte* (1922), new edition edited by Erich Gerlach (1968).
106. We are indebted to Professor S. Simitis (University of Frankfurt) for drawing our attention to the full significance of the distinction between private and public law and its implications for the development of labour law.
107. See O. Kahn-Freund, 'Hugo Sinzheimer 1875–1945', p. 76. See also on this matter the comments of Karl Renner: 'The private contract (of employment) by means of the complementary institutions of collective agreement, labour exchanges, social insurance and the like, has become an institution of public law': *The Institutions of Private Law and Their Social Functions* (1949, reprinted 1976), with Introduction and Notes by O. Kahn-Freund, p. 121. Kahn-Freund noted (p. 172) that in England, where the distinction between private and public law was not as important as in civil law systems, the individual employment relation was transformed by voluntary collective agreements without legal sanctions.

108. See O. Kahn-Freund, 'Hugo Sinzheimer 1875–1945', p. 78. The quotation is from Karl Marx, *Wage-Labour and Capital* (1847/1849), editors' translation.
109. Otto Gierke, *Das deutsche Genossenschaftsrecht*, Vol. 1, 1868, p. 1035ff. The second volume appeared in 1873, the third in 1881, and the fourth in 1913, although it had been written nearly twenty years before. Parts of the third volume were published in 1900 in a translation by Professor W.F. Maitland under the title of *Gierke's Political Theories of the Middle Age*, and parts of the fourth volume were translated and introduced by Ernest Barker under the title of *Natural Law and the Theory of Society 1500 to 1800* (1950). For an attempt to place Gierke's work in the context of 'pluralism' as a political theory applicable to the development of industrial relations and labour law in Britain, see W. Milne-Bailey, *Trade Unions and the State* (1934), particularly pp. 238ff.
110. See Renner (1949). In his introduction to Renner (pp. 29–30), Kahn-Freund compared Renner's and Gierke's theories of the legal and sociological nature of the enterprise.
111. H. Sinzheimer, *Ein Arbeitstarifgesetz* (1916), p. 13.
112. See H. Sinzheimer, *Grundzüge des Arbeitsrechts* (1927), pp. 256–75.
113. See E. Ehrlich, *Grundlegung der Soziologie des Rechts* (1913), English edition, *Fundamental Principles of the Sociology of Law* (1962). On Sinzheimer's utilisation of Ehrlich's ideas see Kahn-Freund, 'Hugo Sinzheimer 1875–1945', pp. 96–7.
114. H. Sinzheimer, *Jüdische Klassiker der deutschen Rechtswissenschaft* (1938), p. 244.
115. Kahn-Freund, 'The Study of Labour Law' (1979), p. 197. On the assumption that pluralism denies the ultimate priority of the state over civil society, Sinzheimer cannot be classified as a pluralist, as he made very clear in his review of Gurvitch's work (see Sinzheimer (1935a)).
116. See the more or less contemporaneous debate in the British labour movement between the 'collectivists', e.g. S. and B. Webb, *Industrial Democracy* (1897), and the 'Guild Socialists' as represented by G.D.H. Cole, *The World of Labour* (1913), and *Self-Government in Industry* (1917). The political impact of the shop stewards' movement in Britain was much less dramatic than that of the 'councils' movement' in Germany in 1918/19, which may help to explain why Sinzheimer's position was to the left of the Webbs.
117. Kahn-Freund has expanded on this theme in chapter 1 of *Labour Relations: Heritage and Adjustment* (1979).
118. See Braunthal (1978), pp. 55–83, 150–4.
119. See ibid., pp. 151–4. The SPD's support for compulsory arbitration tended to reinforce the KPD's accusations of 'social fascism': see the comments of Wolfgang Abendroth, also a student of Sinzheimer, in *Ein Leben in der Arbeiterbewegung* (1976), pp. 81–2.
120. 'Hugo Sinzheimer 1875–1945' (1976), pp. 85–6. 'The Changing Function of Labour Law' (1932), pp. 173–6. See also Kahn-Freund, 'Collective Agreements under War Legislation', *Modern Law Review*, 6 (1943) 112, especially note 30; *Labour and the Law* (1977 ed.), pp. 116–17.

121. The Sinzheimer quotation is taken from his obituary on Philipp Lotmar of 1922, reprinted in Sinzheimer (1976), Vol. 1, p. 408.
122. Franz Neumann, 'Die politische und soziale Bedeutung der arbeitsgerichtlichen Rechtsprechung' (1929), in Ramm (1966).
123. See Kaskel (1932), pp. 83–4.
124. Martiny (1976), p. 141. Kahn-Freund's statement that 'my little book was a plea for a "pluralistic" frame of reference' ('The Study of Labour Law' (1979, p. 199)), is comprehensible only if one envisages a strain of pluralism considerably to the left of Kahn-Freund's own position in the 1970s. See the concluding section of this introduction, 'The Weimar Legacy'.
125. K.D. Bracher, 'Introduction' to H. and E. Hannover (1966), p. 10.
126. H. and E. Hannover (1966), pp. 14ff.; also Neumann (1942), pp. 27–9.
127. Neumann (1942), p. 27.
128. See Bracher, 'Introduction' (1966), p. 13; also Bracher (1971).
129. Quote from a speech by the President of the Academy for German Law, *Reich* Minister Dr. Frank, at a conference on 'The Jews and Jurisprudence', sponsored in Berlin in October 1936 by the national university professors' group of the National Socialist League to Preserve the Law. Major excerpts from the speech are cited by Sinzheimer in his 'Preface' to: *Classical Jewish Scholars of German Jurisprudence* (1938), pp. 9–13, here p. 11.
130. Spiros Simitis, 'Otto Kahn-Freund', *Arbeit und Recht*, 27 (1979) 369.
131. See further Roy Lewis, 'Collective Agreements: The Kahn-Freund Legacy' (1979), and Roy Lewis, 'Kahn-Freund and Labour Law: An Outline Critique' (1979).
132. W. Däubler, *Das soziale Ideal des Bundesarbeitsgerichts* (2nd ed., 1975).
133. See T. Ramm, 'German Labour Law and Otto Kahn-Freund' (1971).
134. B.A. Hepple, 'Sir Otto Kahn-Freund' (1979), p. 196. Kahn-Freund's major comparative labour law works include 'Labour Law and Social Security', in E. Stein and T. Nicholson (eds.), *American Enterprise in the European Common Market* (1960); 'Introduction' and ed., *Labour Relations and the Law – A Comparative Study* (1965); *Labour and the Law* (1977); (with B.A. Hepple), *Laws Against Strikes* (1972); 'On Uses and Misuses of Comparative Law', *Modern Law Review*, 37 (1974) 1; 'The Impact of Constitutions on Labour Law', *Cambridge Law Journal*, (1976) 240.
135. K.W. Wedderburn, 'British Labour Law and Otto Kahn-Freund: 1971' (1971), pp. 2, 3.
136. T.M. Partington, 'Introduction' to *Selected Writings* (1978), pp. xi–xii.
137. O. Kahn-Freund, 'Introduction' to Renner (1949), p. 28.
138. Kahn-Freund suggested the 'organisation' test in his 'Note on *Cassidy v. Ministry of Health* [1951] 1 All E.R. 574', *Modern Law Review*, 14 (1951) 504. On the organisation test and the common law see P.L. Davies and M.R. Freedland, *Labour Law: Text and Materials* (1979), pp. 456–70.
139. *Labour and the Law* (1977), pp. 3, 6.
140. O. Kahn-Freund, 'The Illegality of a Trade Union', *Modern Law Review*, 7 (1944) 192.
141. See R. Lewis, 'Collective Agreements: The Kahn-Freund Legacy' (1979).

142. 'Collective Agreements under War Legislation' (1943).
143. Flanders and Clegg (1954), p. 56.
144. Ibid., pp. 58, 59.
145. Ibid., pp. 63–87; O. Kahn-Freund, 'Legislation Through Adjudication', *Modern Law Review*, 11 (1948) 269 and 429 (*Selected Writings* (1978), ch. 4).
146. The first published indication of the new theory appeared in Kahn-Freund's 'Notes' to Renner (1949), p. 172.
147. Flanders and Clegg (1954), pp. 57–8.
148. *Ford Motor Co. v. A.E.F.* [1969] 2 Q.B. 303.
149. See Donovan Report (1968), ch. VIII; Industrial Relations Act 1971, ss. 34–6; Trade Union and Labour Relations Act 1974, s. 18.
150. See O. Kahn-Freund in Ginsberg (1959) (*Selected Writings* (1978), ch. 1); also *Labour Law: Old Traditions and New Developments* (1968).
151. See Allan Flanders, 'The Tradition of Voluntarism', *British Journal of Industrial Relations*, 12 (1974) 352–70.
152. See note 150. For a criticism of the term 'legal abstention' see R. Lewis, 'Kahn-Freund and Labour Law: An Outline Critique' (1979).
153. See note 84.
154. *Labour and the Law* (1977), pp. 2, 8–9.
155. *Law and Labour – An Ambivalent Relationship*, Joan Woodward Memorial Lecture (1975), p. 8.
156. *Labour and the Law* (1977), p. 4.
157. See R. Lewis, 'Kahn-Freund and Labour Law: An Outline Critique' (1979).
158. Cmnd. 6706 (1977), noted by R. Lewis and J. Clark, *Modern Law Review*, 40 (1977) 323; the Report was discussed by O. Kahn-Freund, 'Industrial Democracy', *Industrial Law Journal*, 6 (1977) 65, and (partly in reply to Kahn-Freund) by P.L. Davies and Lord Wedderburn, 'The Land of Industrial Democracy', *Industrial Law Journal*, 6 (1977) 197; see also the White Paper *Industrial Democracy*, Cmnd 7231, (1978).
159. O. Kahn-Freund, 'Industrial Democracy' (1977), pp. 76, 77.
160. This disenchantment became fairly explicit in Kahn-Freund's final book. *Labour Relations. Heritage and Adjustment* (1979), reviewed by R. Lewis, *Modern Law Review*, 44 (1981) 239.
161. 'Hugo Sinzheimer 1875–1945', pp. 102, 104, 96.

Part II
Selected German Writings of Otto Kahn-Freund

Translator's Foreword

In the initial stages of the translation, I received invaluable assistance and encouragement from Otto Kahn-Freund. Many of his suggestions have found their way into the final translation, and some of his explanations of complex legal terms have been incorporated in the Glossary. I would also like to thank Professor Dr Francis Mann (London) for his help with a number of difficult translation problems, and my colleague Roy Lewis, who has made numerous constructive criticisms in relation to all three texts. In many ways, the translations, like the book as a whole, are the result of co-operative labour. Naturally, though, I alone am responsible for the final versions.

The sub-headings to the essay 'Hugo Sinzheimer 1875–1945' are my own; the original sources of books, speeches and essays by Sinzheimer are identified in Appendix 1. The sub-headings to the monograph, *The Social Ideal of the Reich Labour Court*, are taken from the 1931 edition. The sub-headings to the essay 'The Changing Function of Labour Law' were suggested by myself and approved by Otto Kahn-Freund. Editorial comments in the text and in the notes and references are in square brackets.

At a number of points, German terms with no immediate English equivalent or with a specific historical connotation have been included in the text in brackets. Only those terms whose meaning is not clear from the context of the particular essay have been explained separately in the Glossary.

Jon Clark

2

Hugo Sinzheimer 1875 – 1945

Introduction

The publication of the shorter writings of Hugo Sinzheimer provides a welcome opportunity to look back at the writings and the significance of the founder of German labour law. There can be no doubt that Sinzheimer was the founder of German labour law. It is true that Lotmar's comprehensive and important works, *Collective Agreements between Employers and Employees*[1] and *The Contract of Employment*,[2] were already available when Sinzheimer published his seminal two-volume study on *The Collective Agreement* in 1907 and 1908. Indeed, at many points in this work and in his later writings, especially in the obituary notice of 1922 (1922a), Sinzheimer eloquently acknowledged his debt to Lotmar.

Nevertheless, although he called Lotmar (in a key passage at the end of the first volume of *The Collective Agreement*) the single-handed 'founder of the theory of the collective agreement' and (in the obituary notice (1922a)) the 'founder of the discipline of labour law',[3] it is clear that, during the formative period of German labour law, that is, during the years 1918 to 1928, it was Sinzheimer's ideas rather than Lotmar's which gave form and content to German collective bargaining law in particular and German labour law in general. This fact can only be partly explained by Sinzheimer's conception of collective bargaining law and his clear-sighted view that civil-law principles were only of limited value in its elaboration. Sinzheimer's decisive influence on labour law, in Germany and far beyond the German borders, must be attributed to the fact that he was more than a great legal scholar. He combined in a unique way theory and practice, the *vita contemplativa* and the *vita activa*. All his research was sustained by a passionate will to social justice, and all his practical activity by deep insights born of dedicated and

creative work. Sinzheimer the labour lawyer and Sinzheimer the sociologist are indivisible, as are Sinzheimer the researcher and the teacher, and Sinzheimer the legal policy specialist, the parliamentarian, and the advocate. The fundamental and lasting influence that Sinzheimer has exerted on the development of law in Germany and Europe can only be explained by his unique combination of labour law, the sociological method and legislative politics.

In this article we shall be attempting to gain an insight into Sinzheimer's conception of labour law (*Arbeitsrecht*) and to show the significance that this conception has had for crucial areas of the law of labour, namely the system of collective bargaining, the system of works councils, the contract of employment and the organisation and procedure of labour tribunals. However, it is almost more important to give an appreciation of Sinzheimer's sociological method and how he applied it in his research and teaching long before he explained it in detail after his emigration to Holland, in particular in his book *The Task of the Sociology of Law*, published in 1935. All this is the basis for his activity as a legal reformer and for his theory of 'legislative jurisprudence', which was developed over many decades and which achieved concrete expression in his *Theory of Legislation*, written while he was living illegally in Holland in permanent physical danger and spiritual crisis.

The whole of Sinzheimer's thought and activity is permeated by insights into the fundamental role of 'the human being in the law', and his great Amsterdam inaugural lecture of 1933[4] is but the culmination of reflections on legal anthropology which go back to the period before the First World War. These reflections, and Sinzheimer's whole work, were sustained by a concern for human freedom. Human freedom and the dignity of man were, for Sinzheimer the socialist, as for every true socialist, the alpha and omega of intellectual and political life.

The Establishment of Labour Law as a Unified Legal Discipline

Sinzheimer's main labour law works are the two volumes on *The Collective Agreement* of 1907 and 1908, *A Statute on Collective Agreements* of 1916, and *Basic Outlines of Labour Law*, which first appeared in 1921 and was then reissued in a completely revised edition in 1927.[5] Sinzheimer's thought was constantly stimulated by the demands of the time, and many of his central ideas about the theory and institutions of labour law found expression in essays and speeches which were responses to the needs of the moment. Until now, these essays and speeches have led a fragmented and, in some cases, a hidden existence. They are now

published in the present volumes [Sinzheimer (1976)]. But what cannot be reproduced here is the effect of the great and incomparable orator on his audience. Sinzheimer's lectures, which influenced the thinking of many of his students for the rest of their lives, are now part of history: all that remains of them is the recollection of an ever decreasing circle of ageing men.

It is perhaps difficult for younger generations to imagine the obstacles which stood in the way of the conception of labour law as a unified, independent legal discipline. Sinzheimer's first task was to surmount these difficulties. It is interesting to note that some of the most difficult obstacles he had to overcome were his own prejudices, and it is fascinating to observe how, step by step, he mastered them.

The most serious obstacle was the fetish of the division between private and public law. In the great work of 1907–08 he still considered it necessary to emphasise his 'private law' purity, assuring the reader that not one iota of 'public' law could be found in his analysis. However, in *A Statute on Collective Agreements* of 1916 (was it the influence of the war?), he underlined the 'unity of the law', characterising the barrier between public and private law as 'intrinsically non-existent'. He still insisted on the distinction, but he was gradually undermining it. However, in the two essays on *The New Ordering of Labour Law* (1919a) and on *Advocates and Labour Law* (1922b), and particularly in the important address to the socialist white-collar trade union confederation (the *AfA-Bund*) on *The Further Development of Labour Law* (1922c), Sinzheimer went as far as to demand quite explicitly that private law and public law should be 'fused': similar sentiments can be found in his obituary notice on Gierke (1922d). Sinzeheimer's mature and final statement on this problem can be found in his essay *On Some Basic Questions of the Law of Collective Bargaining* (1929a), published in a collection of essays by academic lawyers to celebrate the 50th anniversary of the founding of the *Reich* Court (*Reichsgericht*). In this essay Sinzheimer critically examined Jacobi's book, *Basic Principles of Labour Law*.[6] Jacobi regarded the collective agreement as an institution of private law and emphasised the need for a clear distinction between public and private law. Sinzheimer did not wish to 'abandon the analytical distinction between public and private law', and he defended himself against the charge of advocating a return to the 'unitary' law of the Middle Ages. But, in contrast to Jacobi, he denied that the dualism of the analytical concepts corresponds to a dualism existing in real life. He saw the collective agreement as an 'amalgam' of public-law and private-law elements: the public-law element is the power of the parties to collective bargaining to create law. However, he went beyond this

when he characterised the norms which organise society, the growing field of 'social law', as a 'third' area of law, combining both private-law and public-law elements. Here we can see the connection between Sinzheimer's conception of the link between public and private law and his idea, to which we shall return later, of an 'economic constitution' (*Wirtschaftsverfassung*), subordinate to the state but independent of it. The view that the ghost of the division between public and private law should not be allowed to hold back the development of labour law has since become generally accepted in Germany and far beyond the German borders.

The other – smaller – fetish, a twin brother of the first, need not have troubled Sinzheimer at all, had it not been so deeply rooted in German traditions and prejudices. At the time of the outbreak of the First World War, Sinzheimer's major concern was to achieve the unification of labour law and to overcome untenable distinctions between different categories of employees. This concern is apparent in two essays, *On the Basic Idea and the Possibility of a Unified Labour Law for Germany* (1914a), which appeared just before the outbreak of the war, and the short article *Unified Organisation for Employees?* (1916), published in 1916. But the unification seemed to have to stop short of 'state' employees. No one who is not completely steeped in the absolutist tradition of German conceptual thinking can understand why as late as 1916 – in *A Statute on Collective Agreements* – the demand for unification still did not extend to 'state officials' (*Beamte*) and 'certain state manual workers', and why the draft statute on collective agreements published in the same book excluded all 'state officials, state salaried employees and state manual workers'. By 1919, however, Sinzheimer envisaged the inclusion of all 'state manual workers' in labour law (*The New Ordering of Labour Law* (1919a)); and the *Draft of a Statute on Collective Agreements* (1921), which was to acquire such a great significance for the development of German labour law after 1945, also covers 'state officials' in so far as the special laws relating to them provide for the conclusion of collective agreements. Only in the 1922 address to the *AfA-Bund* (1922c) and in the 1927 lecture on *The Essence of Labour Law* (1927b) has the state official fetish completely disappeared.

The unification of the sources of labour law was facilitated partly by the events of 1918 and 1919. But these events, and even the introduction of labour law into the universities (largely as a result of Sinzheimer's pioneering activity in Frankfurt), created only the external form of an academic discipline. With what inner spirit would this external form be filled?

Sinzheimer was a master of positivistic legal analysis, particularly in

his younger years: his two volumes on *The Collective Agreement* testify to this. As an advocate with a large advisory and litigation practice specialising in the field of labour law, a concern with the minutiae of the application of statute law was his daily bread. As a teacher he also insisted on a rigorous legal training. Like all good lawyers, he worked his way through the black-letter analysis of the law, in other words, he neither went round it nor got stuck in it. He demanded the same of his students. He would have had nothing in common with those members of the younger generation who are afraid of positivistic training, of 'learning how to think', for fear of weakening their own convictions, nor with those who make a cult out of their own social blindness. He never lost contact with legal thinking outside of labour law. He never fell prey to 'micro-legal thinking', that barren specialisation and intellectual isolation which he explicitly attacked in the obituary notice on Gierke (1922d) and which – to be blunt – makes a large part of labour law writing inside and outside Germany often so exceedingly boring. For him, the practical problems of the application of the law were combined with general insights into the economic and social structure of the employment relationship and into the general problems of the law. There is no clearer example of this than the powerful and authoritative expert opinion he gave in 1924 on the theme of *Cessation of Demand and the Contract of Employment* (1924b). This shows that, for Sinzheimer, the study of labour law was more than a purely academic exercise.

The Three Basic Elements of Sinzheimer's Conception of Labour Law

This basic conception of labour law as a unified legal discipline is Sinzheimer's single most important achievement. It can be seen clearly in the essay *The Essence of Labour Law* (1927b), which develops certain lines of thought already contained in his 1921 edition of *Basic Outlines of Labour Law*. These two texts are supplemented by Sinzheimer's Leiden inaugural lecture on *The Background of Labour Law* (1936a). The three fundamental elements of this conception refer us beyond the confines of positive law: they relate to work (*Arbeit*) itself, dependency (*Abhängigkeit*) as a legal concept and the indivisible link between jurisprudence and legal policy. If Sinzheimer's concept of work is deeply influenced by the insights of Karl Marx, then his discussion of 'dependency' is based on the research of Otto Gierke.

Sinzheimer's definition of work is crucial to all his writings. At the heart of the definition is the contradiction between work and property.

Again and again he quotes the sentence from Marx that labour 'has no other container but human flesh and blood'. Again and again he contrasts the contract of employment, in which the human being gives himself, with ordinary contracts, in which the transfer of a thing or its use or an individual service is promised. The need to separate labour law as a distinct discipline from other branches of the law, particularly from property-oriented civil law, rests on this unique feature of work, namely, that it concerns human beings themselves. The main target for his polemic is the concept of 'contracting for the hire of services' (*Dienstmiete*), the *locatio conductio operarum*. In that context the contract of employment appears as an appendage of the rent contract. The emancipation of human work as a legal concept from the nexus of property law – building both on the writings of Lotmar and, as can be seen from the fine obituary notice (1915a), on those of Karl Flesch, the Frankfurt social policy specialist – was one of Sinzheimer's basic aims. It was inspired by the Marxist analysis of the position of the proletariat in bourgeois society.

This was the sociological basis. Perhaps more important for the juridical elaboration of his theory was the concept of 'dependency'. The combination of Sinzheimer's concept of 'work' and his concept of 'dependency' shows the extent to which, both in his person and in his writings, two traditions meet, the Marxist tradition (partly mediated by Karl Renner's *The Institutions of Private Law and their Social Functions*)[7] and the German Law tradition associated with the name of Otto Gierke. It is impossible to understand Sinzheimer unless we are clear on this point. Gierke's exposition, in the first volume of *The German Law of Associations,*[8] on the capitalist enterprise as an organisation of domination (*Herrschaftsverband*) is – as Sinzheimer emphasised himself in the obituary notice of 1922 (1922d) – one of the keys to the understanding of his own theory. Sinzheimer's view of labour law must be seen in the light of what Gierke says about the unlimited subjugation of the will of the workers – they are 'not active bearers' of the body of the enterprise, but 'objects, tools of its activity'. To be sure, the workers enter the organisation of domination by their own 'free choice' – a perspective which demonstrates the vital difference between the analyses of Gierke and of Marx. 'But this choice relates not to the *whether*, but only to the *where* of the subjugation, and the capitalist organisation tends inevitably to press for the complete absorption of the economic existence of its serving limbs. Outside the organism in which he is located, the worker has no economic personality, and to the extent that his whole economic existence is exclusively conditioned and determined by an alien power, in whose life he plays not the slightest active part, he is devoid of any economic civil rights, not only in the individual

organisation, but in the economy as a whole'. Sinzheimer's theory of the employment relationship as a relationship of subordination was just as strongly influenced by the ideas formulated by Gierke (here and elsewhere) as by Marx's and (following him) Renner's insight that capitalist property is domination over human beings. These were the sources from which Sinzheimer developed his concept of 'dependency'. From this perspective, labour law, the law of 'dependent' labour, appears as an attempt to temper the employer's power to command by the infusion of legal elements.

There remains a third element. From his earliest to his latest writings, Sinzheimer continually emphasises that, in the field of labour law, 'the ultimate purpose of jurisprudence is legal policy. It is only in legal policy that the meaning of jurisprudence is fulfilled'[9] (*On the Sociological and Positivistic Method in the Discipline of Labour Law* (1922e)). And in 1936, in the Leiden inaugural lecture, he says again: 'From the beginning the discipline of labour law could not simply confine itself to the study of "formal" law (*geltendes Recht*): it was obliged, over and above this, to examine the legal policy implications of labour law'[10] (1936a). Here, as elsewhere, Sinzheimer was deeply impressed by the work of Franz Klein – the article celebrating his 70th birthday (1924a) demonstrates this. It is the inclusion of problems *de lege ferenda* into legal scholarship and into teaching in this dynamic area of law that provides one of the reasons why, when looking back at Sinzheimer's writings, they are so much more stimulating and of so much more lasting value than those of many of his contemporaries. His review of Kaskel's monograph on the breach of collective agreements (1923) provides us with a measure of the gap which divided him from many of his colleagues. He insisted on regarding labour law as more than a neat classification of existing rules and principles.

We shall return later to Sinzheimer as a theoretician of 'legislative jurisprudence' and to his legal anthropology. At this point it should be clear that his anthropology (*The Problem of the Human Being in the Law* (1933a)), his sociology and his 'legislative jurisprudence' all resulted from, or perhaps rather entered into, the three elements of his definition of labour law.

The Relation between State and Society: the Concept of Autonomy

Sinzheimer's view of labour law cannot be fully appreciated unless we recognise that it was based on quite specific beliefs about the relationship between the state and society and founded on a very clearly worked out theory of the sources of law. Once again, we can see the great

influence of Gierke, but also of Eugen Ehrlich[11] and Lujo Brentano,[12] however much he may have differed from Brentano on certain points. We are referring here to the question of 'autonomy', the spontaneous law-creating power of 'society', which is central, but by no means confined, to the law of collective agreements.

Sinzheimer's theory of autonomy is based on an assumption of which he himself was not aware: for him, the contrast between state and society was given. His view of the state had deep roots in German tradition – it is perhaps necessary to see things from outside Germany in order to assess the full significance of this fact. At many points in his work the state seems to be a kind of *'corpus mysticum'*, a living being, which has things brought to its notice, which takes an interest in events, or, as he says as late as 1935 in the debate with Gurvitch[13] (*A Theory of Social Law* (1935a)), to which something is indifferent or not indifferent. Of course a strong emphasis on the antithesis between state and society does not necessarily lead to the romantic or mystical harmonisation of the 'state', but in Sinzheimer's work they are linked. This is perhaps one of the weaknesses of his theory, a weakness which, as he showed in a review of Hermann Heller's book on the state[14] (*A New Theory of the State* (1935b)), he later overcame. Nevertheless, he regarded Ministers, civil servants and members of parliament, who make and apply the law, not as individuals and members of society, but as bearers of a will distinct from that of society.

As has been said, this may be a weakness. If it was, it was nevertheless beneficial to the development of Sinzheimer's theory. Only because he so completely and, one could almost say, so naively accepted the theory of the 'real personality' of associations was he able to establish as clearly as he did the contrast between 'state' and 'autonomous' norm creation. Had he been more sceptical towards the idea of the so-called formation of 'state' will, had he regarded state legislation as nothing other than the result of the interplay of social forces 'by other means', how could he have founded the theory of autonomous law-making in labour law, perhaps his most fundamental contribution to the development of labour law both inside and outside Germany.

The principle of 'contractual autonomy', which Sinzheimer first discussed in the study of 1907–08 and then developed with brilliant force of conviction in *A Statute on Collective Agreements* of 1916, appears again and again in his shorter writings and speeches. It is well known that he attempted to validate this principle by reference to analogies from the law of the Middle Ages (certain types of medieval agreements), international law (norm-creating international treaties) and also administrative law. It is also well known that Gierke, despite

his high regard for Sinzheimer's work, expressed doubts about the idea of 'contractual autonomy' in his famous review in the *Archiv für Sozialwissenschaft,*[15] to which Sinzheimer responded critically in his article of 1929 on Jacobi's *Basic Principles* (*On Some Basic Questions of the Law of Collective Bargaining* (1929a)). These matters need not detain us here. What is important is the recognition of the organisations as law-creating bodies, and the conviction that this autonomous norm-creating process is one of the fundamental characteristics of labour law. Developing the ideas of Lorenz von Stein,[16] he stated in the Leiden inaugural lecture of 1936: 'The legal substance of labour law lies in the recognition of classes by the law'.[17] Sinzheimer's 'autonomy' is the creation of law by class organisations. Creation of law means the establishment of norms, but also, as he showed particularly in *A Statute on Collective Agreements,* the observance and enforcement of norms. The social norm cannot be understood without reference to the social sanction.

Now, it is not as though the theory and practice of autonomous norms and sanctions are limited to the collective agreement (*Tarifvertrag*) and the works agreement (*Betriebsvereinbarung*). We are concerned here with a principle which has a general validity for labour law as a whole, namely, that 'state' legislation should as far as possible be subsidiary to 'autonomous' legislation. This idea can already be found in Sinzheimer's important essay *The Will to the Formation of Law* (1914b) and in the article on *The New Ordering of Labour Law* (1919a). It is still present in his *Theory of the Sources of Law and Labour Law* (1934a) and in the – here as always so particularly instructive – Leiden inaugural lecture (*The Background of Labour Law* (1936a)). It is deeply moving to see that the ageing, exiled scholar and legal policy specialist continued *quand même* to embrace the ideas of his youth, giving them new form and depth.

Just as interesting is the fact that Sinzheimer's retreat into the pure *vita contemplativa* in Holland enabled him to relate his idea of 'autonomy' to the similar thoughts and approaches of other scholars whose books he had perhaps not had time to study while still in Germany. His critical review of Gurvitch's theory of law (*A Theory of Social Law* (1935a)), which is, by the way, one of his finest writings, gave him the opportunity of demonstrating that the subsidiary nature of state-created law vis-à-vis autonomously created law cannot mean the replacement of law by autonomous regulation. It is a classical defence of the legal, as opposed to the purely sociological perspective. It should be read together with his critical review of the work of Stammler (*On Formalism in the Philosophy of Law* (1939)), which is a defence on the opposite front,

that is, a defence of the sociological, as opposed to the purely legal perspective.

Autonomy and the Functions of Collective Agreements

Sinzheimer's ideas about 'autonomy' in labour law have become so much a part of the common property of lawyers in Europe that we are scarcely conscious today of their almost revolutionary character at the time. The idea of autonomy is by no means confined to the normative effect of collective agreements. To be sure, the 'normative effect' was Sinzheimer's most individual contribution to the practical realisation of the principle of autonomy in labour law. The fact which crucially determined the character of his original contribution to the whole area of labour law was that – unlike Lotmar, who came from a Roman Law tradition – Sinzheimer did not deduce the automatic compulsory normative effect (*Unabdingbarkeit*) of collective agreements from the principles of civil law. If the compulsory normative character of joint regulation by collective agreement could not be based on the principles of civil law, then Sinzheimer was forced to conclude (influenced, as he emphasised in his obituary notice on Lotmar (1922a), by the German Law tradition) that the legal and social functions of collective agreements and all other 'autonomously' created norms would have to be clearly distinguished from the contractual, 'obligatory' effects of the legal transaction establishing the autonomous rules. This was the important breakthrough which Sinzheimer made in his study on *The Collective Agreement* and in his book, *A Statute on Collective Agreements*. In these works and in many of his shorter writings, we find that clear distinction between the different functions of collective agreements – normative, obligatory, organisational – about which all present-day students of labour law learn in their first lecture on the law of collective bargaining, and which is now a common feature of every continental European legal system. But, at the time when Sinzheimer first conceptualised this distinction, it was a Copernican revolution for labour law.

The rejection of Lotmar's – and later also Jacobi's – civil-law theory of the automatic compulsory normative effect of collective agreements thus had far-reaching consequences for the theory of the legal functions of collective agreements. However, it also had important consequences for the whole theory of autonomy, which plays such a central role in Sinzheimer's work. For the theory of autonomy demanded not only that state-made law should be 'subsidiary', but also that the individual will should be subordinated to the group will. This can be seen in the brilliant lecture on *The Sociological Method in the Discipline of Private Law* (1909), which Sinzheimer delivered in Münich in 1909. This lecture

shows that the methodological influence of Ihering on Sinzheimer's thought was just as important as that of Gierke – we shall return to this point later. For the very reason that, in 'real' (*wirkend*) – as opposed to 'formal' (*geltend*) – law, the behaviour of individuals is largely determined by the norms established by the organised group, 'formal' law must also recognise the legal superiority of the group will if it is not to conflict with legal reality ('real'ity).

While Sinzheimer subjected this idea to sociological examination in the Münich lecture (1909a) and in his review of Franz Klein's *Organisations in the Contemporary World* (1915c), and to systematic legal analysis in his 1929 debate with Jacobi (1929a), he discussed its practical consequences in some of the shorter writings on collective bargaining law. He rejected the 'agency' and 'combined' theories of collective bargaining, in other words, he held the view that, at least on the employee side, the contracting organisation acts exclusively in its own name and on its own account. This was not only based on a teleological analysis of the difficulties to which the idea of 'agency' would lead in practice, but also on a sociological analysis of the function of the associations, the natural 'custodians' of the autonomous norm and the autonomous sanction. As a consequence he argued that, in terms of legal policy, it was necessary to concentrate all powers of sanction in the hands of the associations. It was this demand for the subordination of the individual will to the group will, or rather for the legal recognition of this social subordination, that also led Sinzheimer to reject the idea, at times popular in Germany and also in countries such as France and the USA, that the collective agreement was an 'agreement on behalf of a third party' (i.e. the individual employee).

If Sinzheimer had followed the view of Lotmar – to whom he owed so much – concerning the social effect of collectively agreed norms, he might not have adopted so energetically the demand for the statutory regulation of collective bargaining. It was the need for statutory intervention to achieve the recognition of the automatic compulsory normative effect of collective agreements that gave this demand both its intellectual and its political impetus. The Decree of 23 December 1918 (*TVV*) was based on Sinzheimer's work of 1916. While it is true that the principle of the automatic compulsory normative effect had already been incorporated into Swiss Law[18] before the First World War, it was nevertheless the Decree of 1918, inspired by Sinzheimer, that opened up the possibility of the statutory regulation of collective agreements in almost all European countries. Once a start had been made on collective bargaining legislation, the further statutory development of collective bargaining law remained very much on the agenda. Sinzheimer's shorter

writings between 1918 and 1933 show the present-day reader the extent to which his influence on legislative developments continued beyond his death. What he once called the 'smell of legal policy'[19] (*Advocates and Labour Law* (1922b)) impregnates all these writings. This is true not only of the subsequently so extremely influential *Draft of a Statute of Collective Agreements* (1921), but also of the article *The Struggle for the New Labour Law* (1924c) – in particular the passages on the capacity to conclude collective agreements (*Tariffähigkeit*) – the address on *Labour Law and the Labour Movement* (1927a), and also the earlier article on *The Essence and Significance of Rights of Association* (1919b). Above all this applies to the article in the *Juristische Wochenschrift* of 1924, entitled *The Central Problem of the Reform of Collective Bargaining Law* (1924d), which, together with the *Draft Statute*, which preceded it in 1921, had a formative influence on legislation in the period following the end of the Second World War.

On re-reading Sinzheimer's writings on the law of collective bargaining today, it is difficult to avoid the conclusion that his analysis of the normative effect of collective agreements was more beneficial and influential in legislative terms than his discussion of the peace obligation (*Friedenspflicht*) and the obligation of the contracting organisations to induce their members to observe the terms of an agreement (*Einwirkungspflicht*). It is true that his energetic advocacy of the relativity of the peace obligation in collective bargaining law (*Relativität der tarifrechtlichen Friedenspflicht*) has been successful at the level of theory. However, the translation of this theory into practice lay, neither in Germany nor elsewhere, in the hands of the legislature. Despite paying lip-service to the concept of relativity, the courts have always given this idea a luke-warm reception. In this respect it is unimportant whether, in order to restrict its applicability, they use the technique of contractual interpretation – as was largely the case before the collapse of labour law in 1933 – or the technique of an expansive interpretation of the criminal paragraphs of the Civil Code (*BGB*) – as seems to be the case today. Only in times of most severe crisis (war and catastrophic unemployment) are the courts inclined to accept unreservedly the idea of the freedom to strike. This observation does not only apply to Germany. It applies equally to Great Britain and the USA, and perhaps to a lesser extent to France. Sinzheimer's writings and activity have only had a slight influence in this area. The legal system willingly accepts the autonomous norm. The autonomous sanction recommends itself neither to the mentality of the civil service nor to that of the legal profession.

Likewise, Sinzheimer's ideas (expressed particularly in the work of 1916) on the obligation of trade unions to induce their members to

observe the terms of collective agreements have had no significant repercussions. He undoubtedly over-estimated the role of the 'organisational' function of collective agreements, perhaps because he underestimated the element of 'direct democracy' in modern industrial society. In other words, it could not have been clear to him from his own experience that, particularly in times of near full employment, the authority of the organisations over their members, and thus the practical significance of the obligation of trade unions to induce their members to observe the terms of agreements, is strictly limited. However, he clearly recognised how necessary it is to protect the organisations (who are the custodians of autonomy) by limiting their financial liability for criminal offences and breach of contract. His writings on this issue are all the more interesting because he seems at the time to have known nothing of the parallel discussions and serious conflicts in England and the USA, despite his strong interest in comparative law.

Similarly, he was unaware of the debates in Great Britain about the statutory extension of collectively agreed norms to cover a whole industry (that is, the problem of 'common rule'), and his knowledge of the work of Sidney and Beatrice Webb[20] was not very profound. He was also not acquainted with the constitutional conflicts over the issue of common rule in Australia shortly before the First World War. All the more imposing, however, is his originality in inventing the concept of 'extension' (*Allgemeinverbindlichkeit*), which was incorporated into the Decree of 1918 (*TVV*) and from there entered the legal system of numerous other countries. On this issue he was a real creator of law. In Germany and elsewhere, his idea of the advance of autonomous compared with heteronomous legislation and the gradual replacement of state-created by self-created norms has been largely put into practice.

Despite all this, however, it should not be forgotten that Sinzheimer's basic conception of the relation between the state and autonomy postulated the ultimate absolute primacy of state-made law. Primacy in the normative function and a subsidiary role in the legislative function are surely compatible. Subsidiary role means that the state abstains from establishing rules as far as is practicable, primacy means that it intervenes to establish rules if the organs of the state deem it to be necessary. This whole conception of the relation between the state and autonomy had a crucial impact on the development of labour law in the critical situation between 1928 and 1933. It may seem surprising to the younger generation to see this champion of autonomy advocating compulsory arbitration so energetically, when we know today that compulsory arbitration actually undermined the autonomous system. But, in order to understand this, we need to take into account the desperate situation

of the labour movement in these years and the fact that compulsory awards were often in reality a means of securing a 'social minimum' wage: the achievement of a 'social minimum' was for Sinzheimer one of the tasks of collective bargaining law. One has the feeling that, during the course of this defence of state-imposed terms against attacks from the employers' side, the main emphasis in his definition of the relation between the state and autonomy underwent a significant shift. In the debate with Jacobi (1929a), autonomy appears to be 'derived' from the will of the state. In the article *On the Question of the Reform of the Arbitration System* (1929b), he writes that the state 'grants' the parties to collective bargaining the right to create law. And in the lecture on *The Reform of the Arbitration System* (1930a), he goes so far as to say that the state delegates the execution of its own tasks to the groups directly involved. These articles must be understood in the light of their polemical function, a polemical function underlined by the celebrated judgment of the *Reich* Labour Court in the Ruhr iron dispute of January 1929.[21] However, they have a more far-reaching significance as an indication that a strong insistence on the primacy of the will of the state was at all times one of Sinzheimer's fundamental convictions. The extent and importance of this belief can be gauged by looking at the crucial point of Sinzheimer's political effectiveness, his key position in the establishment in 1919 of the basic constitutional framework of the councils' system.[22]

Autonomy, Works Councils and the Economic Constitution

The principle of autonomy is central to Sinzheimer's ideas and proposals on the 'councils system' (*Rätesystem*) and on the 'economic constitution' (*Wirtschaftsverfassung*). He eloquently expressed these ideas in the two essays *On the Forms and Significance of the Works Councils* (1919c) and *The Future of the Workers' Councils* (1919d), and especially in the two lectures on *The Councils' System* (1919e) and in the two great speeches in the Constitutional Committee of the National Assembly on 2 and 21 June 1919.[23] The areas to be examined in this context are the political significance of Sinzheimer's activity in the National Assembly, the drafting of Article 165 of the Weimar Constitution – the Article was his work – and the debate inside the labour movement on the place of the councils in the overall structure of the constitution. An appreciation of Sinzheimer's central political role at this decisive point in German history was published by Ernst Fraenkel in 1971,[24] and much of our discussion of this matter is based on Fraenkel's article. Sinzheimer was fighting a battle on two fronts. He was very strongly opposed to the idea of rule by councils or soviet dictatorship (*Rätediktatur*): it was generally

believed at the time in Germany that this form of rule existed in the Soviet Union. The councils' system he had in mind was intended not to 'eliminate' democracy, but to 'supplement' it. Socialisation (*Sozialisierung*), he always emphasised, can only be carried out by the 'state'. To make the councils the organs of socialisation would bring with it all the dangers that we normally associate with the idea of 'syndicalism', an expression he did not use until 1936 in the essay on *The Trade Union Movement and the Collective Idea* (1936b). But he also fought against the idea that occupational status groups should be given decision-making power over economic policy (*die berufsständische Idee*). This approach, which was associated at the time with the name of Kaliski,[25] envisaged the establishment of a *Reich* Economic Council (*Reichswirtschaftsrat*) with the status of a second or third chamber, in other words with legislative functions. According to Sinzheimer, the political effectiveness of a new *Reich* Economic Council should be limited to the right to a (written or verbal) 'hearing' by parliament, and the right to propose new legislation.

Sinzheimer was totally convinced that the 'state' constitution should be complemented by an 'economic constitution', where the main actors would be the autonomous social forces, which he never tired of contrasting with the heteronomous 'state'. Only the creation and application of norms by the autonomous social forces would have the flexibility and (an aspect continually emphasised in the speeches and writings of 1919) 'immediacy' to guarantee their effectiveness. However, this 'economic constitution' would be legally subordinate to the state. Despite this, neither the economic constitution as a whole nor the councils' system in particular were conceived as 'state institutions' – Sinzheimer's expert opinion on the legal status of the Bremen Chamber of Labour (*Arbeiterkammer*) (1930b) shows this very clearly. The councils are recognised in law as self-governing institutions, and, like other self-governing bodies, are expected to exist and act, even though subordinate to the will of the state, by virtue of their own authority. The debate in Holland in the 1930s between Sinzheimer the legal sociologist and Gurvitch (*A Theory of Social Law* (1935a)) is in essence simply a continuation – on a broader theoretical basis – of the debate in Germany in 1919 between Sinzheimer the politician and his opponents from left and right.

Because the workers' councils at establishment level (*Betriebsräte* or *Betriebsarbeiterräte*) became a reality, while the rest of the economic constitution – apart from the provisional *Reich* Economic Council of 1919 – never got beyond the planning stage, one is perhaps inclined in retrospect to under-estimate the fundamental importance of the close

links between the workers' councils and the economic councils for the plan as a whole. Sinzheimer's expert opinion on the Bremen Chamber of Labour (1930b) shows clearly that the workers' councils were intended to be intimately bound up with the economic councils. He wrote: 'The distinctive idea behind the councils' system does not lie in the establishment of bodies to represent the interests of the working class, but in the latter's introduction into the economic constitution: this is itself an expression of the participation of the working class in the exercise of functions which were previously denied to it'.[26] Therefore, he continued, the establishment under regional state law (*Landesgesetz*) of a body to respresent the workers vis-à-vis the state does not constitute an invasion of that sphere of activity reserved by the constitution for national government.

In the light of over half a century of concentrated world history, it is easy to stand in judgment over the ideas of 1919 and to pass a verdict on the greater or lesser, and rather more often the lesser, degree of realism in the grandiose vision underlying Sinzheimer's great speeches in the National Assembly. Neither the territorial workers' councils nor the pyramid-shaped edifice of the economic councils were set up. These plans inevitably foundered on the resistance of the private sector of the economy, whose strength Sinzheimer vastly underrated in 1919 – he recognised this retrospectively in his essay of 1930 entitled *The Significance of the Trade Unions in the New Labour Law* (1930c). If, in spite of this, we still today read Sinzheimer's essays, and especially his speeches on these matters, with rapt attention, this is because of the coherence of his plan and above all the visionary power and conviction of his words. We read his stirring exposition on the 'economic constitution' in the same way as we read the great utopian books and political novels of the European past, and we shall continue to read them as long as human beings feel impelled to reflect on forms of political organisation.

We get quite a different feeling, however, when we read what Sinzheimer has to say in 1919 about the workers' councils at establishment level, i.e. the works councils (1919d). Here speaks not only the visionary, but also the experienced legal policy specialist. It is quite astounding how he was able, in the midst of the chaos and turmoil in Germany in the summer of 1919, to see the concrete problems with which the legislature of the Weimar Republic and the Federal Republic, as well as the courts in their practical application of the law, would have to wrestle. Traces of these questions can moreover already be found in his writings dating from the period before the First World War.

Nothing reveals more clearly the continuity in the development of the law at the level of the history of ideas than Sinzheimer's speech in

the Constitutional Committee of the National Assembly on 2 June 1919.[27] It is impossible to know how many of the elected representatives who had the privilege to hear this speech were aware of the background (in terms of the history of ideas) of Sinzheimer's contrast, so suddenly and justifiably made, between organisations of domination (*Herrschaftsverband*) and organisations of fellowship (*Genossenschaftsverband*) as alternative forms of industrial organisation. It is a masterly achievement that he was able, in a political speech, to deduce concrete and highly realistic legislative proposals from an historically underpinned sociological analysis – proposals relating to the tasks of works or workers' councils in matters of works discipline, their participation in the engagement and dismissal of employees, and not least their role in the enforcement of collective agreements. The idea of protection against dismissal, the area of labour law in which the legislation of the Weimar Republic[28] and the Federal Republic[29] has played the most important pioneering role at international level, also has its roots in Sinzheimer's speech of 2 June 1919. Traces of this pioneering achievement can clearly be found in the activity of the International Labour Organisation, for example in the celebrated Termination of Employment Recommendation, 1963 (Recommendation No. 119),[30] and in the legislation of many European countries.

Almost more important, however, is the clear distinction between the function of the councils (and the whole economic constitution 'anchored' in the *Reich* Constitution (*RV*)) and the function of the trade unions and other voluntary associations. Again and again Sinzheimer underlined the need for the occupational regulation of wages and working conditions to take place above establishment level, again and again he pointed to the dangers of a 'narrow factory consciousness' (*betriebsegoistischer Geist*) amongst the workers themselves. Under no circumstances – and this was a cardinal point in Sinzheimer's system of ideas – should the councils be allowed to intervene in the field of activity of the trade unions, under no circumstances should the works agreement (*Betriebsvereinbarung*) become a substitute for the collective agreement (*Tarifvertrag*). The relation between the function of the councils and the function of the trade unions could be summed up in the rather clipped language of the second half of our century: 'Supplement – yes, replace – no'. In 1919 Sinzheimer anticipated the phrase coined by Flatow in 1924, that the works councils should be the 'extended arm'[31] of the trade unions.

All this is quite clear, and it is especially clear that the continued existence of independent trade unions and employers' associations and the regulation of wages and conditions of work by agreements between them were no less a cornerstone of the edifice than the primacy of the

will of the state over the 'economic constitution', existing not in, but alongside the state. Perhaps the clearest formulation of these ideas is to be found in his essay, *The Trade Union Movement and the Collective Idea* (1936b), written and published in Holland in 1936. Here Sinzheimer distinguished between the principle underlying the 'economic constitution', i.e. Article 165 of the Weimar Constitution, and syndicalism (as advocated by Sorel[32] and, following him, by Gurvitch), the fascist corporate state[33] and above all the 'solidarism' of the *Encyclica Quadragesimo Anno*.[34] The supremacy of the will of the state is the main feature distinguishing Sinzheimer's collective idea from that of syndicalism, and – this was fundamental for Sinzheimer – it is the very elimination of the idea of a superior state will that leads syndicalist doctrines to neglect making provision for and upholding 'social human rights' in the midst of the free play of the collective forces. In contrast, the central contradiction between the 'economic constitution' proposed under the Weimar Constitution and the fascist corporate state is that the latter suppresses the freedom of autonomous groups to form their own collective will. In a different way, this is also the main contradiction between the economic constitution and the *Encyclica*, which does not envisage voluntary organisations having any influence on the so-called 'occupational status groups' (*Berufsstände*). Above all, the *Encyclica* shows insufficient concern for the maintenance of public welfare (*Gemeinwohl*), which is distinct from, and superior to the occupational status groups.

It is necessary to read this essay of 1936 to see that Sinzheimer's ideas of 1919 rested on a theoretical foundation of which at the time he himself, under the pressure of events, was apparently not always aware. The relation between the voluntary associations and the statutorily organised councils was complicated, but the character of the associations as organisations of conflict is nearly always emphasised, for example in the speech in the National Assembly on 21 June 1919. In the essay of 1925 on *Europe and the Idea of Economic Democracy* (1925), Sinzheimer also underlined their independent function, and in an article dating from 1929 he declared his warm and unconditional support for Jacobi's private-law conception of the associations (1929a). In the light of all these writings and speeches, his article of 1919 on *The Future of the Workers' Councils* (1919d) appears quite simply to have been an aberration – he cannot have taken seriously the idea that trade union membership should be made compulsory under public law. It is impossible to accept this article as an expression of Sinzheimer's real beliefs. It stands in too great a contradiction to the spirit and the letter of his other writings.

The present-day German reader will find in the great speeches and writings of 1919 not only the beginnings of what later became the co-determination rights of works councils on social policy matters, but also employee participation in economic policy, perhaps even employee co-determination as a whole, of which Sinzheimer had high, perhaps too high, hopes. The present-day reader will also discover, in his exposition on works democracy and economic management[35] (*The Democratisation of the Employment Relationship* (1928b)), traces of disillusion resulting from the attempt to put the theory into practice. Sinzheimer did not live to experience the legislation of the Federal Republic on economic policy co-determination.[36] It is difficult to say what he would have thought of it. It is doubtful whether he would have regarded it as an authentic realisation of his idea of a 'community orientated economy' (*Gemeinwirtschaft*).

The Analysis of the Contract of Employment

Nowhere is the indivisible link between Sinzheimer's theoretical views and his political activity, between the legal scholar and the politician, more tangible than in his creative contribution to the legal and political framework of the councils' system. Nowhere else are we more reminded of Lassalle than in these speeches of 1919. But, ultimately, Sinzheimer was dedicated to academic and theoretical work. At certain times in his life he was a politician, but he was a passionate teacher all his life. Thus, his political activity in the National Assembly was followed by a period of intensive academic activity in Frankfurt, his writings and speeches on the economic constitution and the councils' system were followed by the *Basic Outlines of Labour Law*. Reading this study today, one is struck by the analysis of the contract of employment as one of the most original and influential elements of his whole work. The linking of the elements of subordination (*gewaltrechtlich*) and of exchange (*schuldrechtlich*) in the contract of employment – sometimes he referred to the element of subordination in the manner of Gierke as the 'status' (*personenrechtlich*) element – was one of Sinzheimer's most decisive theoretical insights, distinguishing his ideas from those of many other important labour lawyers, including those of Lotmar. (The fundamental differences are clearly outlined in his obituary notice on Lotmar (1922a).) In this area, also, he was influenced by both Marxist and German Law traditions, but Gierke's importance for this aspect of Sinzheimer's work is overwhelming, a fact confirmed by Sinzheimer's own obituary notice on Gierke (1922d).

Here, once again, Sinzheimer's interest in positivistic legal analysis re-asserts itself. For, as well as its far-reaching sociological significance, the conception of the employment relationship as one of domination and subordination and the decisive rejection (under the influence of Gierke and Menger[37]) of the Roman Law idea of contracting for the hire of services (*Dienstmiete*) had direct implications for legal analysis. This comes out clearly in Sinzheimer's essay on *The Essence of Labour Law* (1927b), in which he discusses the fascinating problem of why the principle of civil law, by which a person who uses material for the manufacture of an article acquires ownership in the material (the so-called *Spezifikationsgrundsatz*), does not apply to the relationship between the employer and the dependent worker.[38]

The idea of the dual nature of the employment relationship as one of subordination and exchange was a cornerstone of Sinzheimer's theoretical system. It was the legal-positivistic correlate of his definitions of work and (in particular) of 'dependency', whose fundamental importance has been discussed above. But these were also practical matters, as is shown by Sinzheimer's short article on the decisions of the *Reich* Labour Court on the subject of the so-called 'works risk' (*Betriebsrisiko*) (*The Reich Labour Court on the Question of Works Risk* (1929c)). The *Reich* Labour Court refused to resolve the question of 'works risk' by reference to those sections of the Civil Code on the impossibility of performance of the contract (*Unmöglichkeit*) and the promisee's (employer's) refusal to accept it (*Annahmeverzug*). Instead it referred to the 'bond' existing between employees and the establishment in which they work, the so-called 'works bond' (*Betriebsverbundenheit*). The Court concluded that, on the basis of the 'works bond', the employee has to bear a part (to be decided by the Court) of the 'works risk'. The most important aspect of Sinzheimer's polemic against this interpretation of the law was that it deduced a community of interest arising out of the element of exchange from a 'bond' arising out of the element of subordination. The employees have a common bond with the works in the sense that they are subject to a common discipline. The employees can be regarded as a collective only as dependent workers, not as partners to a contract based on the element of exchange. Quite apart, therefore, from the false assumption that the employees were participating in the day-to-day management of their establishment – Sinzheimer's discussion of the decision under the title of *The Obligation of the Employer to Disclose Information* (1930d) shows how limited this participation was – this interpretation made the error of drawing conclusions based on the assumption of contractual equality between employer and employee from the existence of an organisation which

was founded in reality on the domination of the employer and the subordination of the employee. Sinzheimer did not mention the more fundamental origins of this interpretation: the reification of the 'works' (*Betrieb*) had deeper causes, which do not concern us here. The vital point here is the close link between Sinzheimer's sociological insights, the systematic conclusions he drew from them, and the rigorous technical work of the lawyer and advocate.

We can say without exaggeration that Sinzheimer's analysis of the individual employment relationship has found an echo far beyond the German borders.

The Organisation and Procedure of Labour Tribunals

It is impossible to do justice to Sinzheimer's significance for labour law without making a passing reference to his role in the reform of the system and procedure of labour tribunals (*Arbeitsgerichte*). The industrial and commercial tribunals (*Gewerbe- und Kaufmannsgerichte*) had existed for some time, but Sinzheimer was without doubt one of the intellectual fathers of the Law of Labour Tribunals (*AGG*), which came into operation on 1 January 1927. The book of 1916, *A Statute on Collective Agreements*, already showed his lively interest in these matters. We can see here the close links he made between the structure of labour tribunals (and in particular the creation of appellate labour tribunals) and the same ideas of economic self-government which were later to find expression in Article 165 of the Weimar Constitution and in the speeches and writings of 1919. We can also see here the advantages he gained by combining an interest in legal theory with extensive experience as a practising advocate and expert adviser.

In many ways the shorter writings and speeches give a clearer insight into Sinzheimer's importance in these matters than his more extended writings, which concentrate largely on problems of collective labour law, especially the law of collective bargaining. (Sinzheimer's views on the councils' system are contained in his speeches as a representative in the National Assembly – he was not a member of the *Reichstag*, which passed the Law of Labour Tribunals (*AGG*).)

As far as Sinzheimer was concerned, the demands for an extension of the competence of the labour tribunals, improvements in procedure and particularly the creation of appellate tribunals, were not only necessary as part of the unification of labour law – although they were necessary for this reason, as he showed in his essay *The New Ordering of Labour Law* (1919a). Over and above this he saw a close connection

between the extension and elaboration of the organisation and procedure of labour tribunals and the development of substantive law. This can be seen in the essay of 1914 *On the Basic Idea and the Possibility of a Unified Labour Law for Germany* (1914a), as well as in the article on *The Idea of Collective Bargaining in Germany* (1915d). Sinzheimer was both sympathetic and sceptical towards the 'free law' movement (*freirechtliche Bewegung*) of this period. His scepticism was based partly on the consideration that the judges as a whole were too far removed from ordinary people (*volksfremd*) to be entrusted with the further development of the law in the way envisaged by the 'free law' school. It would be quite different, he argued, if the courts could be brought nearer to the people by a change in their composition. Then it could be left to them to adapt the general formulations of statute law 'to the new and changing facts of life'. In the article *The New Ordering of Labour Law* (1919a) he wrote: 'If the industrial and commercial tribunals were to be replaced by newly constituted labour tribunals with wider functions, it would be possible to accept that legislation in this area could be increasingly limited to general principles rather than to detailed technical rules and regulations'. We are not concerned here with examining whether and how far the later creation of an expanded system of labour tribunals confirmed Sinzheimer's optimistic prognosis – it may be doubted. What is important is that the continuous, dynamic development of rules was an essential feature of Sinzheimer's overall conception of autonomous labour law.

It goes without saying that Sinzheimer was caught up in the conflicts that developed in the 1920s about the role of professional advocates at all levels of the system of labour tribunals and – especially – about the question of the administrative incorporation of the tribunals into local employment or justice departments. References to these issues can be found in the article on *Advocates and Labour Law* (1922b), in the address on *The Further Development of Labour Law* (1922c) and in the essay on *The Struggle for the New Labour Law* (1924c). He was in favour of admitting representation by advocates in the labour tribunals, at least in all cases involving more than a certain minimum amount of money, though he opposed compulsory legal representation at any stage, including the appellate stages. But he insisted that the participation of advocates in the further development of labour law in the labour tribunals would be beneficial only if the legal profession was prepared to adapt to the spirit embodied in the new tribunals. Sinzheimer's proposals on the organisational structure of the new tribunals were largely identical with what subsequently became legal reality in the Law of Labour Tribunals (*AGG*) of 1926.

The Crisis of Labour Law and the Development of a Sociology of Law

The system that Sinzheimer had helped to create collapsed in 1933. That he was fully aware of this can be seen in the essay *The Crisis of Labour Law* (1933b), which he published in 1933 in *Labour Law* (*Arbeitsrecht*), a journal he had helped to found in 1914. This was in fact his last publication in Germany: it is a gripping article which reads like a farewell. It was his swan song.

Sinzheimer could look back with pride on the development of the discipline of labour law in Germany, which was largely his own creation, but he could have no illusions that labour law loses all meaning 'if it is at best just a law for an élite of workers, if, alongside the living reality of labour law, an economic graveyard of "structural unemployment" opens up'.[39] But the 'crisis of labour law' was not merely an element in the great economic crisis. It went deeper. The economic crisis only served to expose more clearly the tension between the 'social law' character of labour law as Sinzheimer understood it, and the individualistic character of the economic order in Weimar Germany, in which all the optimistic plans for a 'community oriented economy' (*Gemeinwirtschaft*) had long since foundered on the realities of the existing power relations. The tragedy of the Weimar Republic was mirrored in this short essay – the major tragedy of Germany (which in 1933 and the following years ended in its unparalleled moral collapse) and the minor tragedy of labour law. The heirs of Weimar labour law only inherited its letter and not its spirit, regarding it simply as an 'appendage of civil law'. This increased 'the danger of an inner destruction of the new, unique, fundamental substance of labour law'. And this danger was not only a danger for labour law – it was a 'danger for the totality in which we all live'.

Very soon after the publication of this essay, the 'totality' in which Sinzheimer had lived ceased to exist. So-called labour law continued to be taught at the discredited German universities – it no longer had anything to do with what Sinzheimer had intended. After 1945, the forms of Weimar labour law were revived. These developments go beyond the framework of this introduction.

However, the legacy of Sinzheimer's work is more than the insight into the element of subordination in the employment relationship, more than the normative effect of the collective agreement and its 'extension', more than the works constitution (*Betriebsverfassung*) and the role of labour tribunals. It is, above all, his method of research, the sociological method he cultivated, and also his theory of legislative jurisprudence: it is what one is tempted to call his 'legal anthropology' which guarantees him a permanent place in the history of European legal thought. There

is not only an irony of history, there is also a 'biographical irony', the irony in the life of the individual. The irony in Sinzheimer's life was that it was his expulsion from his job and his country that enabled him to achieve a distance from his own life and work. In Holland he was not only able to extend his field of vision beyond Germany, he also found the peace and the leisure to reflect much more deeply on sociological and philosophical problems than would have been possible under the pressure of day-to-day life in Germany. The Dutch universities and colleagues who enabled him to do this have performed a lasting service to the cause of legal scholarship. Not only did he extend his field of vision beyond Germany, he also penetrated more deeply into the German past. The result is his important work of 1938 on *Classical Jewish Scholars of German Jurisprudence*. It is not possible to discuss this book in the present context, but it does illustrate the fact that Sinzheimer's interests and thought extended way beyond the field of labour law. Sinzheimer was such a great labour lawyer because he was more than a specialist, and in particular because he applied the sociological method to labour law. Although he did not fully articulate and explain his sociological method until after 1933, most notably in his great work, *The Task of the Sociology of Law*, it is quite clear that the method had already been conceived before the First World War. In 1909, at the age of 34, Sinzheimer gave an important lecture in Münich entitled *The Sociological Method in the Discipline of Private Law*. At the age of 60, in his work on *The Task of the Sociology of Law*, he developed, clarified and (above all) deepened the ideas of his youth. But the inspiration came, as with all of us, in his youth.

Law and Labour Law: Problems of Theory and Methodology

We have referred above to the decisive impulses which Sinzheimer's thought received from both Marx and Gierke. On reading his sociological writings, however, one becomes aware that, like all thinking lawyers educated in the German tradition, he was very strongly influenced by the ideas and methods of Ihering.[40] This influence can be felt in his lecture of 1909 on *The Sociological Method in the Discipline of Private Law* (1909a) and in his emphasis on the teleological element in research. But Sinzheimer was also very strongly influenced at an early stage by the legal-sociological writings of Eugen Ehrlich.[41] Ihering taught Sinzheimer that – as he wrote in the essay *The Will to the Formation of Law* (1914b) – 'all law (is) social engineering', although it is unlikely that Sinzheimer was acquainted with the writings of Roscoe Pound,[42]

who further developed Ihering's ideas in America. It is likely, however, that it was Ihering's influence which led to his involvement in research into interest groups and interest representation, areas which featured prominently both in the Münich lecture of 1909 and in the book on *The Task of the Sociology of Law*. It is also clear that in Holland, where he made an intensive study of French legal and sociological literature, he must have read Gény's[43] work in some detail: it is also just as clear that he did not know of Saleilles'[44] work, otherwise he would have been sure to quote him. Eugen Ehrlich's research into legal reality (*Rechtswirklichkeit*), as well as Lotmar's pioneering work, were quite obviously in Sinzheimer's mind when he made his highly original contribution to empirical legal research in his study of *The Collective Agreement*, a contribution to research into 'real' (*wirklich*) law, which he combined in exemplary fashion with a rigorous positivistic analysis of 'formal' (*geltend*) law.

The Collective Agreement appeared in 1907 and 1908. The Münich lecture on methodology was given in 1909, and the development of the methodological theory came a generation later in Holland. How much better it is when the practical application of the method precedes the methodological theory, rather than the other way round.

For Sinzheimer, the sociology of law did not imply any 'mixing of methods' (*Methodensynkretismus*). He emphasised again and again – even in his defence of the sociological method against the attacks from Kaskel and Nipperdey (*On the Sociological and Positivistic Method in the Discipline of Labour Law* (1922c)) and in his review of Renner's book on *The Institutions of Private Law* (*Towards a Criticism of Bourgeois Law* (1930e)) – the legitimacy of, and need for, strictly positivistic research into formal law. It is his continued recognition of the importance of such research that makes the contrast between 'formal' law (*geltendes Recht*) and 'real' law (*wirkendes Recht*), and between both of these and 'just' law (*richtiges Recht*), so convincing – all the more convincing when the contrast is made between the corresponding academic disciplines of positive law, the sociology of law and the philosophy of law. It is also interesting that Sinzheimer believed that it was possible to cite the early writings of Marx[45] in support of his protest against the equation of 'formal' law with 'living' law (*lebendes Recht*) (*The Young Marx and the Sociology of Law* (1937)).

In *The Task of the Sociology of Law*, Sinzheimer makes a sharp distinction between descriptive, critical, historical and theoretical sociology of law. In his depiction of the activity of the descriptive sociologist of law (selection, analysis, classification, explanation), one senses that Sinzheimer is drawing on his past experience of research into

the 'real' law of collective bargaining. This section alone provides an abundance of intellectual stimuli, for example, his demonstration that the distinction between 'custom' and 'law' (a purely normative distinction) has no significance for the descriptive sociologist of law; in fact, the descriptive sociologist of law should not concern himself at all with the theory of the sources of law. On the other hand, Sinzheimer treats the question of whether descriptive sociology of law belongs to sociology or jurisprudence with a degree of importance which it does not deserve. This is purely a question of definition, a question of expediency. What Sinzheimer calls the 'critical' sociology of law is the confrontation between the 'formal' norm and the 'real' rule, the conflict between the norm and the normal. Critical sociology of law thus presupposes both descriptive sociology of law, with its investigation of reality, and positivistic law, with its investigation of 'formal' law. It 'attempts to understand what the norm makes out of reality and what reality makes out of the norm, and how the norm is then socially effective in reality', i.e. it is concerned with the social effect of the norm, with the way in which it appears in society and with its social function. Here as elsewhere in Sinzheimer's work one can feel the direct influence of Karl Renner's *Institutions of Private Law* – a fact confirmed by Sinzheimer in his review of Renner's book (1930e) and in his review of Diepenhorst's book on *Property* (1934b). It seemed obvious to Sinzheimer to use Renner's analysis of the problems of property as an example. However, he also indicated that the law of contract should be subjected to the same kind of critical analysis, without perhaps being completely conscious of the importance of his chosen method in this area for an age of mass consumption of standardised commodities. Above all we can see here that his previously rigid and static concept of the state is beginning to give way to a 'critical' sociological approach.

The central feature of what Sinzheimer called the 'genetic' or historical sociology of law was the appearance of a dynamic element, the time factor. The question raised by this approach is: how do the norms themselves change as a result of their contact with reality, i.e. how is the abstract content of the norm made concrete, how does it adapt itself to social reality, how does this reality influence the conceptual grouping of existing norms, and how does the spontaneous social creation of norms ('social self-determination') influence the corpus of existing norms? In this part of Sinzheimer's sociology of law the influence of Ihering is particularly noticeable, especially where he talks about the influence of social reality on the formation of legal concepts. One can only regret that Sinzheimer had no knowledge of the rich American literature on this subject:[46] the need for such a 'historical' sociology of

law is so much more clear in a system of judge-made law than in a situation where the development of substantive law is hidden behind a rigid system of concepts laid down by statute. However, Sinzheimer's 'historical' sociology of law also covers the sociological aspect of the formation of new legal norms. He says correctly that the problem of the 'transformation' of social changes into new norms is still a completely unresearched area, an area where he also sees a particular gap in Marxist theory. (Marxist theory was a matter of special concern to Sinzheimer in his later essay on *The Transformation Problem in the Sociology of Law* (1938), which complements *The Task of the Sociology of Law*.) The final component of his 'historical' sociology of law is the converse problem of the effect of the norm on society – this is vital, since 'a law which is not observed by the social forces is not a law'. There is a link here between historical sociology of law and critical sociology of law.

There is little doubt that Sinzheimer personally regarded the section on 'theoretical' sociology of law as crucial, since here he was confronted with 'the question of the relation between the motivating forces in society and the realm of ideas'. Together with the essay on *The Transformation Problem* (1938) and the short treatise on *The Young Marx and the Sociology of Law* (1937), this is Sinzheimer's debate with Marxism and the materialist conception of history. In the light of Marx's early writings, which were not published until the 1920s and 1930s, Sinzheimer highlighted the 'ideal' element in Marxism, whose idealistic starting point he believed was not superseded by materialism, but incorporated into it. A not unsubstantial part of Sinzheimer's creative work in Holland was dedicated to the demonstration that 'ideational forces' (*geistige Kräfte*) play an independent creative role in the formation of formal as well as real nouns, and that the analysis of the social effects of ideas is one of the most important tasks of the sociology of law.

In Sinzheimer's later writings, one particular motif appears again and again: the practical application of the sociological method. He called his main sociological work *The Task of the Sociology of Law*. At the end of the book he makes it clear that the supreme task of the sociology of law is to merge into 'legislative jurisprudence', about which we shall have more to say below. If he also felt the need to engage in debates with other scholars, in particular with Gurvitch (*A Theory of Social Law* (1935a)) and Stammler[47] (*On Formalism in the Philosophy of Law* (1939)), he nevertheless had a fundamental dislike of unfruitful methodological discussions. His final work was dedicated, not to the theory of the sociology of law, but to the theory of legislation.

One has the clear impression that the Leiden inaugural lecture of

1936, *The Background of Labour Law* (1936a), is just as informative about Sinzheimer's conception of the sociology of law as is his book called *The Task of the Sociology of Law*. His whole life's work is summed up in the demand to focus 'theory on concrete areas of law' and to see 'the general in the particular, but also the particular in the general'. The key to Sinzheimer's sociology of law can already be found in the essay of 1922 on *The Sociological and Positivistic Method in the Discipline of Labour Law* (1922e) where he wrote: 'The ultimate purpose of jurisprudence is legal policy. It is only in legal policy that the meaning of jurisprudence is fulfilled.' The sociological method, however, is indispensable for the achievement of this purpose. For Sinzheimer, the positivistic method 'is essential for an understanding of positive law, but unable to assist in the elaboration of new law. At the very moment when jurisprudential thought advances beyond existing law and wishes to develop new forms of law, it becomes dependent on the sociological method. For only the latter provides the foundations for the tasks of legal policy.'[48]

Sinzheimer's Theory of Legislation: a Philosophical Theory of Political Action

Sinzheimer's *Theory of Legislation*, published posthumously in 1949, is in fact a philosophical theory of political action, a profound critique of the way in which practical politicians or statesmen think and act. In this study, legislation is seen as the realisation of ideas in society. This book (he left behind an incomplete manuscript) represents in every sense of the expression Sinzheimer's last word. However, the clearest formulation of the task of what he called 'legislative jurisprudence' (*legislative Rechtswissenschaft*) can be found at the beginning of *A Statute on Collective Agreements*, and then, twenty years later, at the end of his debate with Stammler (*On Formalism in the Philosophy of Law* (1939)) – this section of the essay was published posthumously. Here we find a very clear definition of the role of the legal specialist in the legislative process: 'Scholars cannot establish a "universally valid" ideal for legislation . . . Nothing has done more harm to the idea of legislative jurisprudence than the belief that its task is to tell the legislator which decisions to make in individual cases . . . It cannot take decisions out of the hands of the legislators, but it can provide them with those elements of knowledge which they need in order to make decisions'.

These 'elements of knowledge' are partly of a positivistic legal nature, such as information about the present state of the law, but they are also of a comparative legal nature (Sinzheimer applied the method of comparative law *practically* in his own work, particularly in his early research, but he never developed it *theoretically*). However, as early as 1922, in the essay *On the Sociological and Positivistic Method* (1922e), Sinzheimer saw very clearly that the positivistic side of 'legislative jurisprudence' could only possibly suffice 'in calm periods of history when a certain degree of equilibrium is achieved in the relations between the social forces'. 'But', he wrote under the direct influence of the social upheaval in Germany after the First World War, 'in times of sudden change, where the old disappears and the new craves recognition, a purely technical insight into the existing legal order is not sufficient'. In his polemic of 1922 against those of his colleagues who were wedded to the routine discipline of black-letter law (1922e), and then again fourteen years later in the Leiden inaugural lecture (1936a), Sinzheimer emphasised that this was especially true of labour law, so much so that, from the beginning, the 'constructive' legal policy element formed an inherent part of his definition of labour law as an academic discipline.

In his theory of 'legislative jurisprudence' – traces can already be found in the Münich lecture of 1909 (1909a) and in the essay *The Will to the Formation of Law* (1914b) – Sinzheimer provided a methodological explanation of an approach to research he had already applied in practice, just as he had done a few years earlier in his work on the descriptive, critical and historical method in the sociology of law. Here, too, his strength lay in the fact that, unlike so many sociologists, who talk about method without applying it, he first applied a method and only then theorised about it. It is only possible to understand what Sinzheimer wrote in his youth in Germany and in his later years in Holland about the methods of 'legislative jurisprudence' if one first studies his *Statute on Collective Agreements* of 1916 and also his *Draft Statute on Collective Agreements* (plus commentary) (1921). It is important to realise that Sinzheimer's reflections on the sociology of law and particularly on legislative jurisprudence both contain a strong autobiographical element. Therein lies their particular value. His analysis of the 'real', 'ideal' and 'effect' factors, which can be found at the end of the essay *On Formalism in the Philosophy of Law* (1939) and again in the *Theory of Legislation*, should be read with this in mind. This last work, which Sinzheimer wrote in an 'illegal' secret hiding place during the Nazi occupation of Holland, is also a debate with himself and with his own past as a practical legal policy specialist and legislator.

Scholarship and Conviction: Sinzheimer's Legal Anthropology

What were the ultimate driving forces behind Sinzheimer's activities? The key lies in what could be called his legal anthropology. It underlies all his work, culminating in the Amsterdam inaugural lecture of 1933, *The Problem of the Human Being in the Law* (1933a). However, what is said there was already clearly hinted at in the essays on *The Change in the World View of the Lawyer* (1928a) and on *The Human Being in Labour Law* (1930f). The article of 1914 on unified labour law (1914a) and the address of 1922 on *The Further Development of Labour Law* (1922d) show that this focus on the 'human being in the law' was a central feature of Sinzheimer's work. One has the feeling, although it cannot be proved, that here we have arrived at the very heart of his work.

Books such as *The Collective Agreement* and *A Statute on Collective Agreements* were not written in the interests of pure knowledge. The sources of inspiration go much deeper. In his obituary notice on Lotmar (1922a), Sinzheimer wrote that 'no scholarship is possible without conviction (*Gesinnung*), without a view of the totality'. The ultimate motivating factor was his active sense of justice. Like Lotmar, he strove after 'the re-establishment of the human being in the modern production process', his emancipation from the fetters laid on him by society. Society covers the unequal treatment of human beings (*Menschen*) with the veil of the equality of persons (*Personen*). 'Persons are equal, human beings are unequal', he wrote as early as 1922 in the obituary notice on Gierke (1922d). Sinzheimer's task was to unmask the 'persona'. The technique of bourgeois society and its law is to cover social facts and factors of social existence with abstractions: property, contract, legal person. All these abstractions contain within them socially opposed and contradictory phenomena: property used for production and property used for consumption, agreements between equal parties and agreements between unequal parties, capitalist and worker. Through abstraction it is possible to extend legal rules, which are appropriate to the social phenomenon for which they were originally developed, to other social phenomena, thereby concealing the exercise of social power behind a veil of law. The insight into this fundamental process is the root of Sinzheimer's legal anthropology.

The 'liberal' concept of the person was a symbol of the emancipation of the worker from slavery and serfdom. From the thing to the person – in a manner of speaking this was the precondition of Sinzheimer's legal anthropology – from the law of things in serfdom to the law of obligations in the contract of employment, in which the parties are assumed to be 'equals'.

It was Sinzheimer's aspiration to show the way from the law of contract to the law of labour, from the treatment of the worker as a 'person', abstractly equal to the employer, to his treatment as a human being, concretely dependent in his existence. The law had previously focused on 'the equal rights of all persons before the law', it was now to concern itself with the concrete conditions under which individuals had to exist, as he wrote in the article on *The Changing World View of the Lawyer* (1928a). Or, as he said two years later in the article on *The Human Being in Labour Law* (1930f), the law, which had previously ignored the dependency of the working human being, will now recognise it as the norm. The extra-legal fact of human existential dependency will now become a legal fact, the person will now become a living being, the law will no longer take as its starting point the abstract freedom of the person, but the concrete dependency of the individual, not the postulated 'will', but the empirically established 'condition' of the human being. All this is expressed with great eloquence in the Amsterdam inaugural lecture (1933a) – the legal anthropology, which he had continually hinted at in his early writings, is developed here in detail. Sinzheimer also argued that labour law would eventually be superseded by 'economic law', in which the individual and social spheres would merge, and the community would embrace the whole life of the human being. Sinzheimer only touched briefly, as he himself conceded, on this idea about the future development of the law, and he never got round to giving a clear and full picture of what he actually meant by it. This is regrettable, since the Amsterdam lecture (1933a) contains certain formulations, which, if taken in isolation, could be interpreted as a demand for the subjection of the individual will to the dictatorial power of the 'whole'. This was not Sinzheimer's intention. For, in his Amsterdam inaugural lecture (1933a), as in many of his early writings, he made it clear that the ultimate goal of all his work was not the subjugation of the human being, but his emancipation.

Sinzheimer's whole work is dominated by the motif of freedom. It can be found in the introductory chapter of *A Statute on Collective Agreements* of 1916, where he shows that additional legal obligations in the employment relationship would contribute to the emancipation of the working human being, it can be found again in the address of 1927 on *Labour Law and the Labour Movement* (1927a) as well as in his examination of *The Essence of Labour Law* (1927b) and of works democracy and economic management (1928b). 'The destiny of man is human freedom', he wrote in *The Task of the Sociology of Law*, and at the end of his Amsterdam inaugural lecture (1933a) he enlarged on the same idea. His whole work is a call to the emancipation of man. One can only do justice to his sociological writings if they are seen in

this light. He was a passionate dialectician, and the antithetical style of the great speaker and teacher was still a dominant factor in his later writings. He was an artist in his use of words, and sometimes the aesthetic pleasure in a striking formulation may have misled him to neglect finer nuances. But one has to have experienced Sinzheimer as a speaker and especially as a teacher, as has the writer of these lines, in order to gauge the strength of ethical conviction which shone through every one of his brilliant and rousing speeches. His ideas had a decisive influence on the life and work of his pupils. No-one could fail to be affected by the power of his words, and everyone was warmed by the fire of his will to social justice and the emancipation of man.

Notes

1. Philipp Lotmar, *Die Tarifverträge zwischen Arbeitgebern und Arbeitnehmern. Archiv für soziale Gesetzgebung und Statistik*, 15 (1900) 1–122.
2. Philipp Lotmar, *Der Arbeitsvertrag*, 2 Vols. (1902 & 1908).
3. Sinzheimer (1922a), reprinted in Sinzheimer (1976), Vol. 1, p. 412.
4. The Amsterdam inaugural lecture was entitled *The Problem of the Human Being in the Law* (Sinzheimer (1933a)), but the phrase 'the human being in the law' was first coined by Gustav Radbruch in his book of that title (*Der Mensch im Recht*) published in 1927. Sinzheimer refers to Radbruch's work in his article on *The Change in the World View of the Lawyer* (Sinzheimer (1928a)).
5. The first edition was based on Sinzheimer's contribution on *Labour Law* to the *Pocket Dictionary of the Political Sciences* (*Handwörterbuch der Staatswissenschaften*), 4th ed., Vol. 1, pp. 844–872.
6. Erwin Jacobi, *Grundlehren des Arbeitsrechts* (1927).
7. The first edition appeared in 1904 under the pseudonym of Josef Karner. A revised edition was published in 1928 under the title of *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion*. It was this second edition that was published in English translation by Routledge and Kegan Paul in 1949, with an introduction and notes by Otto Kahn-Freund.
8. Otto Gierke, *Das deutsche Genossenschaftsrecht*, Vol. 1 (1868), pp. 1035ff.
9. Reprinted in Sinzheimer (1976), Vol. 2, p. 38.
10. Reprinted in ibid., p. 150.
11. Ehrlich's main publications were: *Grundlegung der Soziologie des Rechts* (1913) (reprinted in 1929 and 1967); *Das zwingende und nicht zwingende Recht im Bürgerlichen Gesetzbuch für das Deutsche Reich* (1902); *Die Rechtsfähigkeit* (1909); *Die juristische Logik* AcP 1917, Vol. 115, p. 125 and separately in 1918 (reprinted in 1925 and 1966). A collection of his smaller writings was edited by Manfred Rehbinder in 1967 and published under the title of *Recht und Leben, Schriften zur Rechtstatsachenforschung und zur Freiheitslehre.*

12. Brentano's main publications were: *Die Arbeitergilden der Gegenwart*, 2 Vols. (1871/72); *Über das Verhältnis von Arbeitslohn und Arbeitszeit zur Arbeitsleistung* (1876); *Der wirtschaftende Mensch in der Geschichte* (1923); *Konkrete Grundbedingungen der Volkswirtschaft* (1924); *Mein Leben im Kampf um die soziale Entwicklung Deutschlands* (1931). For Sinzheimer's assessment of Brentano, see *On the 70th Birthday of Lujo Brentano* (1915b).
13. Gurvitch's main publications were: *Fichtes System der konkreten Ethik* (1924); *Les tendances actuelles de la philosophie allemande* (1930), 2nd ed. (1949); *L'idée du Droit social* (1932); *Morale théorique et science des moeurs* (1937), 3rd ed. (1961); *Essais de sociologie* (1938); *Eléments de sociologie juridique* (1940); *La vocation actuelle de la sociologie* (1950), 2nd ed. (1963); *Déterminismes sociaux et liberté humaine* (1955); *La multiplicité des temps sociaux* (1958); *Traité de sociologie* (1958); *Dialectique et sociologie* (1962).
14. Hermann Heller, *Staatslehre* (1934), 2nd ed. (1965). The other main publications of Heller were: *Hegel und der nationale Machtstaatsgedanke* (1921); *Sozialismus und Nation* (1925); *Die Souveränität* (1927); *Europa und der Faschismus* (1929), 2nd ed. (1931).
15. *Archiv für Sozialwissenschaft und Sozialpolitik*, 42 1916/17 815ff.
16. Von Stein's main publications were: *System der Staatswissenschaft* (1852/56); *Der Sozialismus und der Kommunismus des heutigen Frankreich* (1842), 3rd ed. (1850), reissued in 3 volumes under the title of *Geschichte der sozialen Bewegung in Frankreich* (1921); *Verwaltungslehre*, 8 vols. (1865–1884); *Die drei Fragen des Grundbesitzes und seine Zukunft* (1881).
17. *The Background of Labour Law* (1936a), reprinted in Sinzheimer (1976), Vol. 2, p. 157.
18. *Swiss Civil Code* (10.12.1907), Part V, *Law of Obligations* (30.3.1911), Article 322/23.
19. Hugo Sinzheimer, *Advocates and Labour Law* (1922b), reprinted in Sinzheimer (1976), Vol. 1, p. 72.
20. *History of Trade Unionism*, 1st ed. (1894), 2nd ed. (1920); *Industrial Democracy*, 1st ed. (1897), 2nd ed. (1920).
21. Judgment of 22 January 1929, Vol. 3, pp. 178ff. Cf. also the publication of the judgment and the pre-appeal decision together with the expert opinions etc. in *Der Rechtsstreit im Arbeitskampf der westdeutschen Eisenindustrie* (1928), edited by Grauert, Schoppen, Mansfeld.
22. These were contained in Article 165 of the Weimar Constitution.
23. Reprinted in Sinzheimer (1976), Vol. 1, pp. 356–72.
24. 'Rätemythos und soziale Selbstbestimmung' in: *Das Parlament*, 1971, No. 14, 3/4/1971. Cf. also *Der Staat als Aufgabe*. Gedenkschrift für Max Imboden (1972) pp. 75ff.
25. Cf. on this point the copy of his speech at the 2nd Councils' Congress in Berlin in April 1919 which was reproduced under the title of 'Rätesystem und Produktionsaufbau' in the volume *Die Parteien und das Rätesystem*, edited by von Bessmertny and Neven du Mont (1919) pp. 21f.
26. Reprinted in Sinzheimer (1976), Vol. 1, p. 298.
27. Reprinted in ibid., pp. 356–63.

28. *Law of Works Councils*, (BRG), 4/2/1920 (RGBl. 20, I p. 147, sections 84ff.; 96–98).
29. *Law of Protection against Dismissal* (*Kündigungsschutzgesetz*), 10/8/1951, amended version, 25/8/1969.
30. *Recommendation No. 119*, 26/6/1963, concerning the termination of employment by the employer, in: *Conventions and Recommendations 1919–1966*, edited by the ILO (Geneva, 1966).
31. Georg Flatow, 'Betriebsräte und Gewerkschaften' in: *Neue Zeitschrift für Arbeitsrecht*, 1924 385.
32. *Réflexions sur la violence* (1908).
33. *Law on the Collective Rights of Labour (Disciplina giuridica dei rapporti collettivi del lavoro)*, 3/4/1926, *Carta del Lavoro*, 30/4/1927.
34. 15/5/1931.
35. [This was the concluding section of Sinzheimer's chapter on labour law in the collection of essays on *Economic Democracy* (1928), edited by Fritz Naphtali. Sinzheimer's chapter is reprinted in Sinzheimer (1976), Vol. 1, pp. 115–34, and the section on works democracy and economic management is printed on pp. 133–4. The full bibliographical reference for this article is contained in Appendix 1.]
36. *The Law on Employee Co-determination in the Supervisory Boards and Management Boards of Enterprises in the Mining and Iron and Steel Producing Industries*, 21/5/1951 (numerous amendments); the *Works Constitution Acts*, 11/10/1952 & 15/1/1972; [the *Co-determination Act*, 4/5/1976;] the *Act of Representation for Public Employees*, 5/8/1955 (for Federal employees); and similar acts for employees of the regional authorities (*Länder*).
37. Menger's main publications were: *Das Recht auf den vollen Arbeitsertrag* (1866), 4th ed. (1910); *Das bürgerliche Recht und die besitzlosen Volksklassen* (1890), 4th ed. (1908), reprinted 1965; *Die sozialen Aufgaben der Rechtswissenschaft* (1895), 2nd ed. (1905); *Neue Staatslehre* (1905); *Volkspolitik* (1906).
38. Cf. also on this and other points the interesting review of Müller's book on the relevant paragraph of the Civil Code (*BGB*), section 950: Hugo Sinzheimer, *What is the Relation between Section 950 of the Civil Code and the Proposition that Every Worker Should Own the Product of his Labour?* (1932).
39. Reprinted in Sinzheimer (1976), Vol. 1, p. 141.
40. Ihering's main publications were: *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, 3 vols. (1852–1865); *Kampf ums Recht* (1872), 20th ed. (1921); *Der Zweck im Recht*, 2 vols. (1877–1883), 8th ed. (1923); *Scherz und Ernst in der Jurisprudenz* (1884), 13th ed. (1924); Editor of the *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* (1857ff.).
41. See note 11.
42. Roscoe Pound's main publications were: *The Spirit of Common Law* (1921); *Interpretations of Legal History* (1923); *The Task of the Law* (1944); *New Paths of the Law* (1950); *Development of Constitutional Guarantees of Liberty* (1957); *Introduction to the Philosophy of Law* (1922); *Formative*

Era of American Law (1938); *The Future of Common Law*, revised ed. (1954); *Law and Morals* (1924); *Law Finding Through Experience and Reason* (1960); *Social Control Through Law* (1944).

43. Gény, *Méthode d'Interprétation et Sources en Droit Privé Positif*, 2 vols. (1919).
44. Saleilles, *Les accidents de travail* (1898); *De la déclaration de la volonté* (1901).
45. *Der historische Materialismus. Die Frühschriften*, ed. S. Landshut and J.P. Mayer, 2 vols. (1932).
46. Cf. Norbert Reich, *Sociological Jurisprudence and Legal Realism im Rechtsleben Amerikas* (1967).
47. Stammler's main publications were: *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung* (1896), 5th ed. (1924); *Die Lehre vom richtigen Recht* (1902), 2nd ed. (1926); *Theorie der Rechtswissenschaft* (1911), 2nd ed. (1923); *Lehrbuch der Rechtsphilosophie* (1922), 3rd ed. (1928); *Rechtsphilosophische Abhandlungen und Vorträge*, 2 vols. (1925).
48. Reprinted in Sinzheimer (1976), Vol. 2, p. 38.

3

The Social Ideal of the Reich Labour Court — A Critical Examination of the Practice of the Reich Labour Court

Aim and Method of Examination

This attempt to examine the practice of the *Reich* Labour Court (*RAG*) in terms of its underlying social ideal proceeds from a specific approach towards the basic character of the judiciary. This approach cannot be justified here, it must be assumed. The following analysis will be meaningless to anyone who regards judicial activity as nothing more than the application of given statutory norms to a set of given or ascertainable circumstances, since it assumes that this activity is guided by ideas or conceptions which originate not in the norms of statute law, but in the judge's own economic, social or moral feelings, in his convictions and inclinations. Of course very few people today, and even fewer practising lawyers, still subscribe to the view of the judge as a machine whose sole function is to apply the relevant statute to each particular case in a rational and logical fashion. It has long been recognised that it will never be possible to achieve in practice a 'formal rationality'[1] of statute law. Initially this fact was accounted for by the theory of the 'gaps in the law' which the judge is required to fill, until eventually, via the circuitous route of the so-called 'elastic norms' (the legal provisions based on 'good faith' or 'public policy', etc. – sections 138, 242 and 826 of the Civil Code (*BGB*)), the situation has been reached today where judicial decisions which fill the gaps in the law completely outweigh those which simply apply the law. We shall aim to show below that, particularly in

the field of labour law, the judges have consciously proceeded to apply exclusively social, moral or economic norms in their decisions, even where it would have been possible to resolve a particular dispute by means of the 'pure application of the law'. If then the judge does not derive the norms on which he bases his decisions primarily from statute law, the question arises as to where he does derive them from. A legal system which obliges the judge to adopt a particular political viewpoint solves this problem in a simple way. When for example Soviet legislation orders the judges to uphold in their decisions the class interests of the proletariat, or when the fascist legal system defines the task of the judiciary in terms of the promotion of the interests of national production, then, at least in theory, the source from which a judge has to draw the norms on which he bases his decisions is unambiguously stated. The peculiarity of the present situation in Germany has two distinct elements. On the one hand, both the belief in the power of the judiciary to administer absolute justice and the belief in positive law as a comprehensive, complete, closed system have disappeared. On the other hand, there is no general agreement on the social ideal which the judiciary should be implementing in its decisions. In this situation, in the absence of externally defined norms, it is inevitable that the judiciary will create its own social ideal.

However, it is not the task of this monograph to examine, perhaps biographically or psychologically, the social origins of the judges of the *Reich* Labour Court (*RAG*) and how they arrive at their particular views, nor to investigate, by the method of the sociology of law, why the *RAG* must adopt a particular viewpoint in the present social situation. Such an examination would go way beyond the task we have set ourselves here. It would mean that we would have to derive the necessity for the evolution of a particular ideology from the overall economic and social situation in Germany, a rewarding task, but one which could not be confined to judicial decisions in the field of labour law alone.[2] In fact, the aim of this study is much more modest. We shall be attempting simply to uncover the social ideal which underlies the practice of the *Reich* Labour Court. Our approach will be to treat all the decisions of the Court as a unified whole and to reveal, by a systematic analysis of the totality of these decisions, the social and economic ideas underlying them. We are thus not attempting to investigate every individual decision in order to expose the 'irrational forces'[3] contained in them. It is of no value to examine each individual decision in isolation and to uncover the true social or psychological motive contained in it, quite apart from the fact that we are not dealing with irrational forces at all but with a manifestly conscious social ideal.

In so doing we must reject from the outset any crude attempt to describe the social views underlying the judicial decisions of the *RAG* as either 'pro-employer' or 'pro-employee'. It would surely be a very weak attempt at sociological analysis to characterise the decisions of the *RAG* in terms of a bias in one or other direction. If things were as simple as that, it would not be worth engaging on the following examination. We shall attempt to show that the social ideal of the *RAG* is in fact much more complex than it appears at first sight.[4]

The Concept of Fascism

In the course of this examination continual reference will be made to a social ideal which will be characterised as fascist. In order to avoid misunderstandings from the outset, it is perhaps appropriate to make the following initial statement about the concept of fascism used in this study.

When the term fascism is used, it is not meant to refer to the actual conditions which exist in Italy or have existed there in any earlier period. Rather fascism is understood as the social system which has found expression in the Italian Law on Collective Labour Relations (*Disciplina giuridica dei rapporti collettivi del lavoro* of 3 April 1926) and in the Charter of Labour (*Carta del Lavoro* of 30 April 1925).[5] The extent to which the aspirations contained in the Law and the Charter have actually been realised in Italy is not important for our study. What alone is important is that the fascists have felt it necessary to lay down certain objectives to which they should at least aspire.

The socio-political mechanism which underlies fascist law, and which is called here the fascist social ideal, can initially be defined in negative terms, as a rejection of the three systems which have until now dominated the social policy of the capitalist age, namely, liberalism, social conservatism and collectivism. Liberalism, which condemns all combinations and leaves the structuring of social relations to the free play of social and economic forces, is as distinct from fascism as social conservatism, which places the existentially isolated, uncombined individuals of the working class under the social protection of the state. Fascism also stands in conscious opposition to collectivism, particularly of the German kind, which leaves the structuring of social relations to the conflict between the two classes which are party to the basic contradiction in society. All three systems have contributed in terms of the history of ideas to the evolution of fascism, but fascism itself is something new. It takes from economic liberalism the essentially negative attitude towards a state-run economy. It takes from social conservatism the idea of state 'welfare

provision' (*Fürsorge*) and the idea that the national interest should be the dominant factor in the structuring of social relations. Simultaneously, it takes from social conservatism the rejection of social conflict. Finally, it derives from collectivism the idea of the formation of associations and the idea of the associations as the key social actors in the conflict between the two main classes.

Under the social system of fascism, collective industrial action is forbidden. On the other hand, the state proclaims a large measure of social protection for the individual employee. On both sides 'syndicates' are formed; if they are recognised by the state, they can obtain the right to collect dues compulsorily both from their members and from employers and employees who are not members. Organisations of employers and employees recognised in this way can conclude collective agreements, which have a compulsory normative effect both for members and non-members. Collective disputes are dealt with in a kind of arbitration procedure, which has at its apex a 'Labour Magistrature' (*Magistratura del Lavoro*), i.e. a court which takes decisions both on disputes about existing collective agreements as well as on disputes about collective rights which have yet to be created and are arbitrable. Three basic ideas underlie this system: the supreme interest of national production, in whose cause economic peace must be upheld; individual discipline vis-à-vis the higher interest of economic productivity; and the idea of state welfare for the individual employee. In its emphasis on discipline and welfare provision, the fascist system of ideas is identical to that of social conservatism. However, through the new idea of the integration of the organisations of employers and employees into the framework of the state, fascism supplements the ideology of social conservatism with the help of an institution taken over from the socialist-syndicalist system of ideas. The actual development in Italy towards such a system has not been a conscious fusion of elements in the way indicated above, it has in fact been a combination of neo-liberalism, a Southern European brand of revolutionary syndicalism, and a typically nationalistic attitude. However, this is once again a purely historical statement relating to present-day Italy and does not affect our analysis.

Having completed this conceptual clarification, we shall now turn to a portrayal of the social ideas underlying the decisions of the *Reich* Labour Court.

The Regulatory Intervention of Judicial Decisions in Collective Conflict

In the first place we must examine which general conceptions of the relationship between employers and employees as classes govern the

judicial decisions of the *Reich* Labour Court and the *Reich* Court on labour issues. Two different approaches are conceivable. The judges can take the view that the socio-economic conflict between employers and employees is a given fact to which they must give due recognition, and that the conflict which governs the relations between these parties must be resolved in terms of each particular case: the judiciary plays no decisive role in regulating the conflict. According to this approach, the judiciary should allow the conflicting parties to resolve their own conflicts, confining itself to the cautious application of existing norms and intervening only when the law makes it absolutely necessary. This would mean, for instance, that the judges would give the widest scope at plant level to the activity of employee representatives through their statutory organs (works councils etc.) and to the resultant defensive actions or counter-attacks of the employers, refraining from imposing norms of behaviour from outside, either on employee representatives or on employers. In cases where a collective agreement had been broken or an act had been committed in a conflict between a trade union and an employers' association or individual employer which was clearly illegal under the Civil Code, the judges would still be expected to carry out their duty to prevent such acts or to award damages against the guilty party. However, they would not be able to investigate the actions of the parties to a dispute in terms of any external criterion which might question the appropriateness of a particular instance of industrial action. In other words, the purpose of industrial conflict should be determined by the collective parties themselves, and not by the judges.

The opposite view is also conceivable. The judges can approach the conflict between the social adversaries from a specific perspective; they can view the conflict as a means of achieving a specific purpose, to be determined not by the conflicting parties but by the interests of the state. They would then investigate the lawfulness of industrial action with reference to this purpose. If the judiciary chooses this approach, it cannot leave the conduct and settlement of disputes at works level to employee representatives and employers. On the contrary, it must consciously steer the activity of both sides in the direction it has chosen, no longer treating industrial conflicts as simple power struggles between the respective parties, but as a means to a higher end. It must thus approve or condemn a conflict according to whether it is appropriate to the achievement of the purpose determined by the Court.

The *Reich* Labour Court has undoubtedly adopted the second approach. This can be demonstrated first of all by its attitude towards the system of works councils.

The Tendency to Regulate Conflicts at Works Level: the Concept of 'Works'

According to section 1 of the Law of Works Councils (*BRG*), employee representatives have a dual task, namely, to protect the economic interests of employees vis-à-vis the employer and to support the employer in the achievement of the 'works objectives' (*Betriebszwecke*). Both tasks, which are intrinsically completely distinct from one another, are accorded equal value in the statute. The so-called social policy function of the works council, that is, the protection of the interests of employees vis-à-vis the employer, implies that its task is to achieve the implementation of trade union policy at works level. This is the spirit of the law (*BRG* ss. 8, 31 and 47), even if it is not expressly spelt out in the statute. Inasmuch as the Law of Works Councils extends the scope of this social policy function, it is an exclusively labour law statute which introduces no fundamental innovations in the field of economic policy. In contrast, the economic policy function (support in the achievement of the works objectives), conceived as a starting point for the socialisation of the economy, goes beyond the framework of labour law. It is an example of economic law (*Wirtschaftsrecht*), which is intended to limit the freedom of the employer to control the use of the means of production. In fact, the economic policy function of the works council has been a complete failure. In truth, it has neither limited the control of the employer over the means of production, nor brought about even the most modest move towards the achievement of economic democracy (*Wirtschaftsdemokratie*). Nowadays, works councils are recognised in practice by all participants as the representatives of the interests of employees vis-à-vis the employer, and not as the organs of a unitary 'works' (*Betrieb*) in whose interests they must co-operate with the employer.[6]

In spite of this, the *Reich* Labour Court has ignored the actual state of relations between employers and employees at works level in its interpretation of the law and based its general definition of the 'works' on the economic policy function of the works councils. This became apparent for the first time in a judgment of 29 May 1929.[7] In this case, a works councillor had refused to work overtime beyond the statutory eight-hour-day, believing that he was not obliged to do so; he had then been summarily dismissed under the Civil Code (*GewO*, s. 123(1)(3)) on the grounds of 'persistent refusal to work'. The regional state labour tribunal, the second appellate stage, had held the worker's good faith in his favour, and adjudged that he 'had been party to the dispute as a worker' and, 'as chairman of the works council, had had a primary

obligation, under section 1 of the Law of Works Councils (*BRG*), to protect the interests of the workers'. This view was strongly opposed by the *Reich* Labour Court. The Court adjudged that it was legally incorrect that the primary obligation of the appellant, as chairman of the works council, was to protect the interests of the employees. For, under section 1 of the *BRG*, both the economic policy and representative functions of the works council were 'accorded equal value': 'the appellant was thus obliged, as chairman of the works council, to protect the interests of the works as a whole, and not to give priority to those of the employees'. As such, he was not a 'party to the dispute, but an adviser to the works management'. The view he took of his function was not 'obligatory', but 'unilateral'. Thus, according to this interpretation, a works councillor is required, in cases where the interests of the employer conflict with those of the workforce, to regard himself as the organ of a higher third party, that is, the 'works'.

This train of thought has been further developed by the *Reich* Labour Court in subsequent decisions. In a decision of 10 July 1929,[8] it stressed the obligation of a works councillor under the Law of Works Councils (*BRG*, s. 66(6)) to promote understanding and co-operation among the workforce, deriving from this a limitation on the rights of works councillors to engage in political or trade union activity inside the works. In connection with this, the Court considers that a works councillor can be legitimately relieved of his representative position if he holds a trade union meeting immediately after a statutory works meeting (*Betriebsversammlung*), on the grounds that he would be mixing up his duties as a works councillor with his duties as a trade union official.

A similar tendency can be found in the decision of the *RAG* of 21 December 1929[9] to approve the dismissal of a communist works councillor because he had distributed leaflets outside the factory gate calling for a strike, even though there was no mention in the leaflet of the name of the large factory concerned. The *RAG* held that membership of the works council places a general obligation on a worker to conduct himself in the interests of the works, even when he does not happen to be acting in his capacity as a works councillor.[10]

Finally, this kind of judicial interpretation reached a certain climax in the decision relating to the obligation of works managements to present a balance of accounts to the works council.[11] In works which normally employ at least 300 employees or 50 salaried employees and where the entrepreneur is obliged to keep accounts, he must, if requested under section 72 of the *BRG*, present the works accounts and a profit-and-loss account to the works council by a certain date. Subsequently, a law was passed concerned with the practical implementation of this

statutory provision (the Law of Works Accounts (*Betriebsbilanzgesetz*) of 5 February 1921). Under section 2 of this Act, information must be provided giving a more detailed breakdown of the individual entries; this information must be backed up by documentary evidence, although the management is under no obligation to make the actual documents available. The issue under dispute was whether the employer was obliged to give the works council information about the salaries, travelling expenses and pension arrangements etc. of the members of the board of management. The *RAG* decided that, broadly speaking, there is no obligation to provide such information, and, among other reasons, it put forward the view that the two tasks of the works council, its economic policy task and its social policy task, are inextricably linked with one another and that in carrying out one of its tasks it must not disregard the other. Since both tasks are accorded equal value, the works council must always look after the interests of the whole works and not give priority to the interests of the employees. If therefore, argued the *RAG*, the protection of the interests of the employees is contrary to the interests of the works, then the former must be limited. In particular, the employer's obligation to provide information finds 'its natural limit . . . in the need to protect the interests of the works . . . In particular, it must not lead to a situation where works secrets are revealed or are even simply in danger of being revealed, since in such cases *the entrepreneur would be required to do something which ran counter to his most fundamental interests*'. The *RAG* claims to find direct support for this line of thought in the economic policy function of works councils, since information about the salaries of board members etc. could in certain circumstances lead to the public disclosure of works secrets. For this reason, the works council could not demand this information, since it would thereby be acting against the very works interests which it was obliged to protect. The *RAG* uses this argument even though, as it stresses itself, works councillors are expressly required under the Law of Works Councils (*BRG* s. 2(11)) to maintain confidentiality, i.e. the law already assumes that the works council may be informed of works secrets.[12]

What is the present status of the system of works councils according to the case law of the *RAG*? In short, by giving increasing emphasis to the primary importance of the 'works' as a unitary body, the *RAG* has undermined the main function of the works council, to represent the interests of employees at plant level. In other words, it has consciously introduced into conflicts at this level a regulatory element which is external to these conflicts, and it has done this by reference to the shadowy economic policy function of the works council, which in reality

exists only on paper. The effect of the *RAG*'s decisions has been to restrict attempts by employees to fight for their interests. What was originally intended as a starting point in a move towards the socialisation of the economy has gradually been transformed by the *RAG* into a limitation on the really fundamental task of the works council: the representation of the interests of employees. The employees and their representative bodies may no longer freely engage in conflicts of interest with the employer at works level, but are obliged, in the pursuit of their interests, to take account of a supposedly higher third party, the 'works'. Limitation of conflict in the interests of the works is the basic sociological idea underlying these decisions, and it seems not to matter to the *RAG* that it has never actually arrived at an economic definition of the 'essence' of the works and has never yet attempted to show how the works can be distinguished economically from the employer. In spite of this, the *RAG* continues to make liberal use of the concept of 'works' in the definition first established by the *Reich* Court. According to the *RAG*, the works is the 'overall economic organism, composed of things (equipment and plant) and persons (employer and employees): the organism is not however dependent on the personnel always remaining the same'. This is quoted from a judgment of 8 February 1928.[13] This concept of works is used by the *RAG* for the most diverse ends and in the most diverse contexts. We shall come across this concept again and again during the course of our examination. The term 'organism' explains the 'essence' of the works as much or as little as it explains the nature of the state.[14] Instead of a definition we find a metaphor. With this 'image' of the organism, the *RAG* believes that it has explained the social and economic 'essence' of the phenomenon called the works. Having created an 'image' and apparently uncovered an 'essence', it subordinates the real forces of industrial conflict to the interests of this illusory and shadowy construct, and forces the employer and works council into an unnatural alliance in aid of an economically unexplained, only metaphorically defined phantom which, in the framework of a private enterprise economy, can be nothing other than a special kind of property owned by the employer. Although it is never made explicit, it is obvious that this concept of works is derived economically from a not very sophisticated 'wages fund' theory. But the *RAG* has not made even the slightest attempt to provide an economic *clarification* of the concept.

It is of crucial importance for our investigation that the regulatory limitation on conflicts of interest between employer and employee at works level by reference to a supposed unitary body, whose economic identity with the employer is incontrovertible, has become one of the

bases of the decisions of the highest appellate court in the field of labour law.[15]

The Tendency to Regulate Conflicts at the Occupational Level: the Idea of 'Economic Peace'

The regulatory intervention of the *RAG* in the sphere of interest of the social parties occurs at plant level via the concept of the works and the economic policy function of the works council. In the larger field of occupational conflict (*berufliche Auseinandersetzung*) the legal provisions used by the *RAG* to justify its intervention are the 'peace obligation' (*Friedenspflicht*) of the parties to a collective agreement and section 826 of the Civil Code (*BGB*), which allows an award of damages against anyone who wilfully harms another person in a way which offends against public policy. What is of greatest importance in this context is that the *RAG* becomes involved in the question of the 'legitimacy of the aim of a strike'. It should be clearly understood that this is not a question of the effect of a conflict on the social adversary, nor a question (naturally also posed, this time by the *Reich* Court) of the extent of the harm to employers (from a strike or boycott) or to employees (from a lock-out); nor is it a question as to whether the methods used were necessary in order to achieve the particular aim, a question which must always be answered in the framework of section 826 of the Civil Code. The *RAG* is concerned here with the question of whether the aim being pursued was *legitimate in itself*. This question has been raised, for example, in the decision of the *Reich* Court (Sixth Civil Division) of 30 October 1929.[16] In this case, the Court was concerned with the possible contravention of public policy occasioned by a strike which was called to prevent the use of blackleg labour, and which was subsequently prolonged in order to secure the reinstatement of workers who had been on strike. The *Reich* Court argued that the strike had not been against public policy, and emphasised in its reasoning the 'legitimacy of the aim of the strike' (ibid., p. 574). In the context of our study, it is not the decision itself but the reasons for the decision which are significant. The *Reich* Court had undertaken an investigation of the legitimacy of the strike, but had made no statement about the criteria on which it had based its investigation. This became even more explicit in the decision of the *RAG* of 19 March 1930.[17] This was a case in which the management had attempted to introduce, on an experimental basis, the so-called 'Bedaux system' [a wage payment system based on time-and-motion study], and the workers had refused to participate in the experiment. Under the existing collective agreement, new methods of wage payment could be introduced only with the consent of the

relevant trade union. The Court had to decide whether the trade union was obliged under the existing agreement to induce its members employed in the plant to comply with the introduction of the new system on an experimental basis. It should be stressed at this point that the *Reich* Court and the *RAG*[18] have consistently re-affirmed in their decisions that the 'peace obligation' of the negotiating parties is only a 'relative' obligation (*Relativität der Friedenspflicht*), that is, that the conclusion of a collective agreement does not prohibit the parties to that agreement from engaging in industrial action *per se*, it only prohibits industrial action which aims to change the terms of existing agreements before they have expired. Industrial action in pursuit of aims not covered by an agreement is thus permitted. In its decision, the *RAG* affirmed the obligation of the trade union to induce its members employed in the plant not to oppose the management's experiment, even though it recognised that the peace obligation as defined above did not require such behaviour from the trade unions, since the introduction of these experiments had been mentioned neither explicitly nor implicitly in the collective agreement. However, the *RAG* justified its interpretation in the following way: it cannot be assumed that the freedom to take industrial action on issues not covered by a collective agreement automatically implies that either party to collective bargaining has the unlimited right to take industrial action against the other. Every collective agreement serves to maintain and protect economic peace. 'Like other contracts, collective agreements are *governed by the principles of good faith*. According to these principles, all parties to a collective agreement are obliged by the very conclusion of the agreement to abstain from unreasonably disturbing economic peace. Industrial action against the other contracting party or its members on issues which are not jointly regulated may only be initiated or supported in pursuit of an *economic aim* or another reasonable cause'. In all other cases, industrial action constitutes an infringement of the peace obligation. In the case under examination, this was deemed to be so. For it was not evident, so the Court argued, that any particular economic aim was being pursued, nor that any other legitimate cause existed or exists. The respondent (i.e. the union) had infringed the obligation on all parties to a collective agreement not to disturb economic peace without reasonable cause.

The common factor uniting these two decisions with those we have examined above concerning the activity of the works councils is the introduction of a regulatory element into the conflict between the social parties. However, there is also a basic difference between these two sets of decisions. In its decisions relating to the works councils, the *RAG* puts

forward the shadowy construct of the 'works and its interests' as the main factor which should regulate the conflicts between employers and employees. When it comes to the protection of occupational interests by trade unions, however, the *RAG* puts forward not a shadowy construct, but a highly concrete and real view of economic relations, that of 'economic peace' (*Wirtschaftsfrieden*). Here, for the first time, we are confronted with an objectively identifiable social ideal of the *Reich* Labour Court. No justification is given as to why this social ideal should guide judicial decisions. It exists, nevertheless, and takes effect in a large number of other decisions (which will be discussed later). What is already clear at this stage is that the *RAG* has been extending its regulatory intervention not only in the field of workplace conflict but also in the field of occupational conflict. It establishes aims for the parties which they have not established for themselves. It places the collective organisations (trade unions and employers' associations) in the service of an aim which is external to them. They are no longer allowed simply to pursue objectives derived from their own sectional interests, they must now pursue the supposed objectives of the public as a whole. It binds together trade unions and employers' associations economically, harnessing them to a social mechanism situated above the classes whose task it is to preserve the precious institution of economic peace.

But the *RAG* does not stop there. It accomplishes the inner transformation of the collective organisations not only economically and socially, but also in terms of constitutional law. The opportunity to do this arose out of the question of the *voluntarily declared incapacity to conclude collective agreements* (*gewollte Tarifunfähigkeit*). The problem here is, in short, whether an organisation can volunatrily deny its own capacity to conclude collective agreements, and thereby exclude itself from the possibility of being made subject to a compulsory award under the Arbitration Decree (*SchlVO*), by including in its rules of association (*Satzung*) a clause declaring its unwillingness to conclude collective agreements. After the *Reich* Court had established its position on this question in five previous decisions,[19] without however entering into any discussion about the basic characteristics of collective bargaining organisations, the question was settled for future practice by the two decisions of the *RAG* of 10 April 1929.[20] In these decisions, the *RAG* rightly denied the possibility of voluntarily declared incapacity to conclude collective agreements. In our context, however, what is significant is the reasoning behind this decision, which can be summarised as follows. The collective labour law of the post-revolutionary period is based on the central agreement between the employers' associations and employee

organisations of 15 November 1918. Building on this agreement, the Collective Agreements Decree (*TVV*) of 23 December 1918 introduced the idea of the normative effect, which conferred on the organisations jointly regulating conditions of employment the power to conclude agreements (*Tarifgewalt*) on behalf of those parties subject to the terms of the agreements. By this measure, the economic forces which already jointly controlled the regulation of terms and conditions of employment were vested with powers and obligations under public law through the introduction of industrial self-government. According to the general principles of constitutional law, an association is not allowed to renounce its public-law status, and the principle of freedom of association (Articles 124 and 159 of the Reich Constitution (*RV*)) is not affected by the conferment of public-law duties (and the limitations arising from them) on existing associations, which have been freely established, are free to change their rules, and can be freely dissolved. The general duties of associations are not determined by their rules of association. On the contrary the legislature makes use of those associations which have the capacity to conclude collective agreements (and their infrastructures) by conferring on them a public-law duty in pursuance of a lawful purpose. This duty, which was established not by an arbitrary decision of the members of the association but by the will of the legislature, cannot be relinquished by a change in the rules of association without changing the fundamental characteristics which made the association suitable to assume the duty of collective bargaining, and from which it therefore derives its statutorily recognised capacity to conclude collective agreements.

We must be clear what this means. In the view of the Court, the trade unions and employers' associations have become public bodies, obliged to carry out certain duties (duties in the interests of economic peace) whether they wish to or not. If these organisations were concerned solely with the protection of particular sectional interests, then the legislature and the labour tribunals would be obliged to leave it up to the organisations themselves to decide whether it was desirable to conclude collective agreements or not, although they could, in the case of a compulsory arbitration award, force one party to 'make an agreement', even if it had declared its unwillingness to conclude agreements in its rules of association. (In respect of this last point, it would appear that the result of the decision of the *RAG* was correct.) The effect of these decisions is that the autonomous fighting organisations of the working class, which were initially opposed, then tolerated and finally recognised by the legislature, have been virtually converted into institutions of the state, which uses them to maintain economic peace. Just as

the works council has been transformed from an organisation representing the interests of employees into an organisation of the 'works' as of a higher third party, so the trade unions, if they were to conform to the decisions of the *RAG*, would be transformed from organisations of the working class for the improvement of conditions of employment by means of industrial conflict or collective agreements into instruments of the state to maintain economic peace and prevent industrial conflict.

This tendency of the Highest Court (*das Höchste Gericht*) can be illustrated by numerous other examples, of which we shall mention just a few. The decision of the *Reich* Court of 18 March 1930[21] was concerned with the action of workers in a particular colliery, who had stopped work before the end of the full working day in contravention of an arbitration award which had been declared compulsory by the *Reich* Minister of Labour. Having forced their way out of the pit, the workers then went on strike. Although the *Reich* Court was unable to establish that the trade union had issued a positive call to strike, it nevertheless awarded damages against the union, stating among other reasons that the union's full-time officers had not shown the least indication of peaceable intent in their leaflets or speeches, and that they and the union itself could not have been in the least doubt that the effect of their behaviour would be not to promote but to disturb economic peace. The correctness of this decision cannot be doubted, for the conclusion of a collective agreement imposes not only a negative but also a positive peace obligation on a trade union. If trade union members are threatening to break the peace obligation in order to change collectively agreed conditions of employment, the union must use every means at its disposal to induce its members to uphold the interests of economic peace. What is noteworthy about this decision in the context of our study is simply the vigour, one might almost say the zeal, with which the Court manifests its support for the goal of economic peace, showing clearly that the Highest Court feels an exceptional degree of sympathy with a particular social goal.

The same deeply felt commitment can be seen in two decisions of the *RAG* of 26 January 1929 and 8 February 1930.[22] The decisions were concerned with a collective agreement concluded after a strike which contained a clause prohibiting the use of disciplinary measures against strikers or, more positively, placing an obligation on the employer to re-instate the workers who had been on strike. The *RAG* decided that the clause could not apply to those workers who had been so carried away during the strike that they had committed acts of violence against employees who had been willing to work. The collective agreement contained no clauses which might have justified this decision. It

can only be explained by what we have characterised as the sympathy of the Court for the idea of economic peace. Furthermore, this tendency of the *RAG* to protect economic peace and to transform the fundamental character of the trade unions is most clearly expressed in its decisions relating to the May Day celebrations. Apart from the fact that both the *RAG* and the *Reich* Court[23] have deemed that the celebration of 1 May by an employee is a just cause for instant dismissal,[24] the *RAG* has also affirmed that it is contrary to public policy for a workforce to go on strike, with the support of their union, when one of their colleagues has been instantly dismissed for taking time off work to celebrate May Day.[25] The achievement of the re-instatement of the dismissed worker by force was characterised by the *RAG* as an aim which, 'in the view of all people believing in equity and justice, offends against public policy'. It is of particular interest that the greatest offence against public policy for the *RAG* was clearly the union's 'assertion of its will to power' (*'Geltendmachung des Machtwillens' der Gewerkschaft*).

This is a clear tendency which is intimately connected with the promotion of economic peace. The simple assertion by a trade union of its 'will to power' is always against public policy in situations where the *RAG* is unable to recognise behind this assertion of power an immediate economic aim which it regards as 'legitimate'. For, in the view of the *RAG*, a trade union should precisely *not* be an organisation of power, but an instrument of peace. The same applies to employers' associations, except that, as we shall see later, the employer is in a position to compensate for his loss of power at the collective level by the considerable extension of his unilateral right to manage at works level. The same idea (the breaking of the trade union's will to power) is also very conspicuous in the decisions of the *RAG* on boycotts (the blacking of a particular works).[26] A typical example of this tendency of the *RAG* is the decision of 21 March 1928.[27] In this case, as in all others, the *RAG* emphasises that in itself a boycott is a lawful method of industrial action; however, in certain cases, it can contravene the general principles contained in section 826 of the Civil Code (*BGB*). We shall not discuss here the fact that the *RAG* (not the *Reich* Court) has given such an expansive interpretation of section 826 in its two decisions that it is now almost impossible to conceive of any situation at all in which a boycott could in practice be a lawful act. What interests us in this context is rather the fact that the *RAG* suspected (and this it described as damaging evidence against the union) that the trade union 'intended not only to protect the interests of the machine-shop workers, but also to bring its economic power to bear on the appellant and on the parties to the collective agreement'. The fact, therefore, that a trade

union might take action in order to make others feel the force of its economic power, in other words, might engage in a 'policy of prestige' (*Prestigepolitik*), is an unlawful act under section 826 of the Civil Code.

The tendency of the *RAG* to limit industrial conflict, and its simultaneous policy of transforming the intrinsic character of the collective organisations, could be illustrated by many other examples. It will be sufficient to refer to the very important decisions of the *RAG* on the obligation of workers to carry out so-called indirect strike work, and on the extensive interpretation of the peace clauses in collective agreements.[28] Finally we should also mention the extension of the peace obligation by a decision of the *RAG*[29] according to which the employer, in spite of the now unchallenged doctrine that it is the collective organisations and not their members who are the parties to a collective agreement, is legally entitled to initiate a defensive lock-out following unofficial passive resistance by his employees, i.e. resistance not approved by a trade union. The Court justified its decision by citing the idea of solidarity, which makes a trade union indirectly liable for the actions of its members, even though it may have opposed or at least not approved them. Thus the trade union becomes a guardian of economic peace. This is also a contribution to the tendency of the *RAG* to regulate occupational conflict.

Despite these decisions, and although the Highest Court is clearly opposed to the deployment of trade union power, it must be emphasised nevertheless that it has a very positive attitude towards the idea of trade union organisation in principle. This can be shown, for example, in the very extensive interpretation which the *Reich* Court gives to the concept of freedom of association, particularly in the decision in which it pronounced the abolition of the 'anti-combination' provisions of the Industrial Code (*GewO* s. 152(2)) in favour of Article 159 of the Weimar Constitution (*RV*),[30] even though on the other hand it could not bring itself to accord Article 165 s. 1(2), which gives formal recognition to collective organisations of employers and employees, the status of a normative legal rule.[31] In their decisions on compulsory union membership, i.e. the question of the replacement of non-union employees by union members in a particular works, the *Reich* Court and the *RAG* have also stressed the necessity for trade union activity,[32] although in this case they have taken into account the need to protect non-union employees from economic 'destruction' as well as the need to extend trade union organisation. If therefore the *Reich* Court and the *RAG* do not oppose the organisations as such, their false conception of the fundamental characteristics of collective organisations of employees

(the tendency we have outlined above to give priority to the idea of economic peace and to negate conflict) is expressed nevertheless most clearly in those decisions where they have to answer the question of what exactly a collective organisation of employees is. By stating in its decisions of 10 October 1928, 29 September 1928 and 9 February 1929[33] that the will and the ability to take industrial action are not fundamentally necessary characteristics of a trade union and by therefore, in certain circumstances, even recognising the capacity of 'yellow' company unions (*gelbe Gewerkvereine*) to conclude collective agreements, the *RAG* has given clear expression to the fact that, although it recognises trade unions, it does not regard them as fighting organisations of employees. Recently, the *RAG* has recognised the capacity of the employee groups of the Farmers' League (*Landbund*) to conclude collective agreements, a possibility which had been suggested by the decision of 29 September 1929. With this judgment, the *RAG* has placed itself in open conflict with the predominant view in jurisprudence and and with the absolutely dominant practice of the administrative (and particularly the social insurance) authorities in their interpretation of the concept of 'economic association' (*wirtschaftliche Vereinigung*).[33a] This cannot have happened without there being a definite intention behind it. The decisions fit perfectly into the overall picture we have outlined above, namely the tendency of the *RAG* to regulate occupational conflicts in the interests of economic peace.

The Regulatory Tendency of Fascism

How can we explain the three elements of judicial decision-making we have examined above: the regulatory intervention in the conflict between capital and labour over and above what is necessarily required by the legal system; the orientation of this regulatory intervention towards the ideal of economic peace; and the tendency to recognise collective organisations as necessary instruments of conflict, but to reject their pure assertion of power? These tendencies are explicable neither in terms of a liberal, nor of a conservative, nor indeed of a collective-socialist view of the world. The affirmation of the works as an (albeit shadowy) objective entity and the recognition of the necessity of collective organisation distinguish the social ideal of the *RAG* from any kind of Manchester liberalism. The very fact that it is the state which determines the aim of the conflict between employers and employees also speaks against the influence of liberal economics on the decisions of the Highest Court. We progress no further either by attempting to explain the decisions in terms of social conservatism. For the social-conservative view, as advanced by Bismarck, for example, rejects collective action just

as much as does liberalism, only with the difference that the conservative affirms the paternalist idea of welfare provision which the liberal rejects. In fact, we would argue that the unique combination of the ideal of economic peace and the recognition of collective organisation, and furthermore the regulation of collective action according to aims which lie beyond the framework of the collectivist system, all correspond exactly to the fascist way of thinking as expressed in the two basic labour laws of Mussolini's Italy already discussed above. Fascism also affirms the collective organisations, seeing in them necessary components of the national organism: in fact, under section 5 of the Law of 3 April 1926, fascism makes the recognised unions and employers' associations the statutory representatives of all industrial employees and employers. Fascism also rejects industrial conflict, indeed it is prohibited under section 18. However, the fundamental tenet of fascism, above all others, is that the collective organisations of employers and employees do not exist for their own sake nor even for the sake of simple class interests: in fact the concept of class (*Klasse*) is rejected and replaced by the concept of occupational status group (*Stand*). The distinction between these two concepts is broadly that the element of conflict is fundamental to class and the element of co-operation to occupational status group. In other words, the essence of class consists in either ruling or being ruled, while the idea of the occupational status group implies the realisation of the concept of co-ordination. If by its very nature an oppressed class aspires to achieve power, an occupational status group improves its position (if this is necessary) by co-operating with other occupational status groups. The concepts of *Stand* and *Klasse* are being employed here according to the usage prevalent in trade union circles, particularly among unions of salaried employees. It is no coincidence that the public-law view of trade unions and employers' associations adopted by the *RAG* in its decisions on the voluntarily declared incapacity to conclude collective agreements (a view also once expressed by the *Reich* Court in a casual aside made in a much-noted earlier decision)[34] is influenced by writers who are either close to the German National Association of Clerical Employees (*Deutschnationaler Handlungsgehilfenverband – DNHGV*) or who have acted on behalf of this organisation as expert advisers.[35] The *DNHGV* is the organisation whose ideology is closest to that of fascism, since it combines the concept of the rigid and unchanging occupational status group and the idea of co-operation with an intensely individualistic approach to social policy.

Under Article 4 of the *Carta del Lavoro*, the collective agreement is the concrete expression of solidarity between the different factors of production, because it is a method of reconciling the opposing interests

of employers and employees, subordinating their [sectional] interests to the higher interests of production ('La loro subordinazione agli interessi superiori della produzione'). In this case also, therefore, the interests of production, of economic peace, are paramount; collective organisation is but a means to an end.[36] The two basic features of this type of regulatory intervention are: the recognition of trade unions and employers' associations in the service of a higher third party, in the interests of 'production' (from the standpoint of the free trade unions the destruction of the very idea of a trade union); and the transformation of the unions from organisations of struggle into organisations of economic peace, from organisations of the working class against the capitalist class into instruments of the state to control the working class. This is the first area in which the social ideal of the *Reich* Labour Court accords with fascist ideology.

The Inner Transformation of the Individual Employment Relationship Through Judicial Decisions

So far, we have concentrated on collective conflict at the level of the works and the occupation. We now wish to examine how the *RAG* intervenes in and transforms the individual employment relationship, in other words how it conceives of the relations between the individual employer and the individual employee.

The Works Bond and its Effect on the Rights of the Employee: the Works Risk

To begin with, we can refer back to our previous discussion of the position of the works councils. We have already emphasised there that the *RAG* has based its decisions on a clearly defined concept of works (*Betrieb*). We have also demonstrated that the *RAG* has so far made no attempt to give an economic justification of its theory of the works as an organism, and that we are still endeavouring, without success, to find in its decisions an explanation of those factors which distinguish the works in economic reality from the owner of the works. However, the *RAG* did not stop there. Having defined the works as an organism, mainly by reference to the economic policy function of the works council (which, as we have seen, exists only on paper), the *RAG* then proceeded to draw from its definition a number of practical conclusions for the law. The most important conclusion it drew was to reject what it called the individualistic view of the employment relationship. According to the *Reich* Court and the *RAG*, individualism means in this context the

treatment of the employment relationship, as in the Civil Code (*BGB*), as a contract between equals, that is as a contract based on exchange. The Highest Court rejected this individualist approach in favour of a 'collectivist' one. Collectivism, it argued, finds expression in the 'works organism', to which both employer and employee belong and which binds them together in co-operative labour in the interests of production. It is this bond (*Verbundenheit*) between the persons brought together in the works organisation which, according to the Highest Court, constitutes the real substance of the employment relationship, and it is therefore from this bond that in many cases the mutual rights and obligations of employer and employee must be derived. Co-operation in the interests of a higher third party is thus not confined to the collective organisations. The individual employer and individual employee also work together in an organism in the interests of a higher third party, the wealth-producing 'works'. Here once again we are not told how this third party differs from the employer. We know nothing about this works other than it is an organism which comprises things (equipment and plant) and persons (employer and employees), and we also gather that the powers of employee participation vested in the works council generate a works bond (*Betriebsverbundenheit*) which creates mutual rights and obligations. The Highest Court has made no attempt to quote a statutory norm from which such a bond between the so-called organism and the individual employment relationship could be derived. Of course, no such statutory norm exists. The Court has confined itself to citing in support of its interpretation the general provisions of section 242 of the Civil Code (*BGB*), according to which contracts must be fulfilled in such a way as is required by good faith and having regard for custom and practice (*Verkehrssitte*). These provisions are completely meaningless, they prove everything and nothing, since 'good faith' is a concept about which, at least in the social policy field, there is no consensus.

The *Reich* Court had its first opportunity to develop this theory, which was subsequently adopted by the *RAG*, in relation to the question of the so-called 'works risk' (*Betriebsrisiko*), i.e. the problem of whether a worker is entitled to the payment of wages if he cannot work owing to causes for which neither he nor the employer is responsible, for example, lack of coal, fire, a faulty machine. The decision of the *Reich* Court in the leading case of 6 February 1923[37] concerned the case of a partial strike: the question at issue was whether workers are entitled to payment if they cannot work because of a strike by workers in a different plant belonging to the same company. The theoretical discussion of this issue in jurisprudence and also in the practice of the lower tribunals had previously revolved around the question of whether this was a case

of impossibility of performance (*Unmöglichkeit der Leistung*) under section 323 of the Civil Code or the promisee's (employer's) failure to accept performance (*Annahmeverzug*) under section 615 of the Civil Code. In the first case, the worker has no right to payment, whereas in the second case the employer is obliged to pay his wages. In other words, this was a question of positivistic jurisprudence, about which there are a number of conflicting views and a number of conflicting legal interpretations. However, the *Reich* Court (Third Civil Division) declared that a satisfactory resolution of the question could not be achieved by reference to the provisions of the Civil Code, since it was obliged to take account of the development of social relations since then and the recent legislation in which this development had found explicit recognition. It argued that the Civil Code itself had frequently had regard for social considerations, particularly in the law of contracts of service; however, it had always confined itself to an examination of the legal relationship between an individual master and servant. In short, the Civil Code was based on an individualistic point of view in accordance with the state of social relations at the time of its introduction. In the meantime, however, the idea of the 'social work- and works-community' (*soziale Arbeits- und Betriebsgemeinschaft*) had gained ground and achieved recognition, and it now governed the relationship between employer and employee in large plants. It was from these ideas and thus from the actual social relations of the day that the solution to the problem had to be derived. In this type of case, the Court was no longer concerned with the relations between the individual worker and the individual employer, but with the regulation of relations between two groups in society, the entrepreneurial class and the working class. Admittedly the contract of employment was still in existence and still had to be concluded before the individual worker could start work. But the worker who concludes a contract of employment now becomes part of the workforce as a whole and thus of the overall organism called the works. The wealth created in the works is no longer produced by the entrepreneur alone with his capital and equipment, but by the joint collaborative effort of the entrepreneur and the workforce. According to the Court, the recent statutes in the field of labour law were based on this idea of collaborative work, particularly the Law of Works Councils (*BRG*), which grants extensive powers of participation to the works council, both to protect the social and economic interests of the employees and also in relation to the management and performance of the works. [I quote from the judgment of 6 February 1923:]

The employee is no longer a mere instrument of the entrepreneur,

> but a living limb of the workforce as a whole. However, this means that, if the works community breaks down owing to causes for which the entrepreneur is not responsible, it is not only he who is affected by the consequences. The works is based on the joint collaborative effort of the entrepreneur and the workforce. *However, the works and its revenue constitute the source of wage payments.* If the individual worker is a limb of the workforce, and also of the works community which exists between the workforce and the entrepreneur and which forms the basis of the works, then it is obvious that, if the works is temporarily closed down and no income is generated as a result of the actions [of any part] of the workforce, then the entrepreneur cannot be reasonably expected to make provision for the payment of wages from other sources.

The link between the wages fund (itself elevated to the status of an organism) and the individual employment relationship is characterised as 'obvious' simply by reference to the idea of 'reasonable expectation'. After some initial hesitation,[38] the *RAG* declared its agreement with this interpretation in the leading case of 20 June 1928.[39] This case also involved a strike, although it took place at a much greater distance from the place of work than in the case decided by the *Reich* Court. The case involved a glass works which had been affected by a shortage of coal as a result of the strike in the lignite-mining industry of Middle Germany [Saxony and Thuringia] in the autumn of 1927. Like the *Reich* Court, the *RAG* also decided that the individualistic standpoint of the Civil Code was out-of-date, arguing that the idea of the 'social work- and works-community' had meanwhile been recognised and established, not only in jurisprudence but also in legislation. The worker, said the Court, was an organic member of the works, no longer simply an instrument of the entrepreneur, but a living limb of the works community. The task of the employee had therefore changed. His position in relation to the works had become a different one. His position was no longer that of an otherwise disinterested individual, whose only task was to put his labour power at the disposal of the works; on the contrary, he now entered into a bond with the particular works in which he was employed. By concluding a contract of employment, he was obliged not only to put his labour power at the disposal of the works, but also to serve the works and its objectives and thereby make *his* contribution to its continued existence and efficiency. Because of this increased commitment, the rights of the workforce in relation to the works had been simultaneously enlarged and extended to a 'supportive participation' in the management of the enterprise. [I quote from the judgment of 20 June 1928:]

> Naturally these increased rights are accompanied by increased obligations, i.e. the sharing of a degree of responsibility for the works. However, if you share responsibility for the works, you must also be a party to the disadvantages arising from it. The workforce as a whole, and therefore also the individual worker, cannot refuse to accept responsibility for the consequences of interruptions in production, and for the works risk, simply by declaring that he supplied his labour power and was prepared to perform his services according to contract. Participation in the management of the works necessarily goes hand in hand with a share in its risks. *This is not altered by the fact that the employee has no direct share in the ownership nor as a rule in the profits of the works.* The only possible effect of this fact can be that the extent of his risk is more limited.

No further general principles could be established on this matter, continued the Court. More detailed guidelines for particular cases would have to be based on the viewpoint of the works bond.

This decision of the *RAG* has assumed an extraordinarily great practical significance. The *RAG* has applied the principles of the decision of 20 June 1928 in a number of similar cases as if they had statutory force; so far 17 have been publicly recorded.[40] With one exception, it has only been where such cases did *not* involve a strike that the *RAG* has ever (but then always) found in favour of the workers.

The *RAG* sets great store by the fact that its interpretation has nothing to do with 'politics'. In the judgment already mentioned above on the obligation to provide supporting documents relating to company balance sheets, the judge at the first appellate stage had based his decision on the case law relating to the works risk (this is the general term covering the decisions we are examining), and had supported his interpretation by reference to the idea of increasing economic democracy. However, the *RAG* categorically rejected this interpretation, and declared that the *Reich* Court and the *Reich* Labour Court had always avoided allowing political considerations to guide their decisions in any way, and had always emphasised the connections which exist, and which must be maintained, between labour law and civil law. However much goodwill there might be towards the economically weaker section of society, considerations of equity and social sensibility should never cause the judge to deviate, in the execution of the duty incumbent upon him, from the framework laid down by statute law, especially as regards the application of the law to a particular case brought before him for adjudication. It is from such a completely objective point of view that the adjudication of a dispute must be approached.

At this point it becomes impossible even to understand the train of thought of the *Reich* Labour Court. First it declares that, although

attempts had been made in the past to solve this question of great practical significance by reference to the regulations of the Civil Code (*BGB*), the Civil Code has in fact been overtaken by developments in the actual social relations of the day. At the same time, it decides that a completely new idea should become the basis of its judicial practice, even though this idea has not been expressed in any statute. Then the Highest Court declares that it has always emphasised the connection between labour law and civil law and denies that its theory of the 'work- and works-community' is a political theory. It makes this statement at the very point where it should be applying the statutory provisions which, in its opinion, first established in law the idea of the works community, namely, the provisions on the economic policy function of the works council. What the *Reich* Labour Court is doing is this. On the one hand, it refuses to give legal backing to the economic policy function of the works council when faced with the question of making it effective; among the reasons it gives for this interpretation is the connection between labour law and the general principles of civil law. On the other hand, it severs this connection between labour law and civil law by pointing to the economic policy function of the works council; it then draws conclusions from this for the individual employment relationship. On the one hand it states that it intends to disregard the provisions of the Civil Code in favour of the viewpoint (*its* viewpoint) of social relations as they have developed since the introduction of the Civil Code. On the other hand, it maintains that it has avoided political considerations in its decisions. One could understand it if the *RAG* refused to make any decisions which could not be backed up by the wording of statute law. One might perhaps disapprove of such a formalistic approach, but one would be able to understand it. However, it is incomprehensible that the *RAG* constantly changes its methods of interpretation, insisting that, despite this change of method, it has maintained a consistent approach. In particular, the Court is inexplicably unable to see that the moment it departs from the simple application of the law, as for example in the decisions on works risk, it enters the arena of political discussion. When it simply applies the law to a particular case, it acts with the highest judicial authority. But when it makes an assertion about the development of social relations since the introduction of the Civil Code and about the creation of a supposed community of production between employers and employees, then it must put up with the fact that other experts (and in particular other courts) who have a different view of social relations also come to different decisions. It cannot complain if a judge who assesses things differently brings his political views into his decisions, just as it has done itself.

In the framework of our examination, these decisions on works risk

have a dual significance. Firstly, they show how far the *RAG* has gone in the assumption that production is the supreme principle which unites the two parties to the employment relationship, and secondly they illuminate the method of judicial interpretation at the highest level.

The decisions on works risk, by the *Reich* Court in the case of a partial strike and by the *RAG* on 20 June 1928, were generally regarded as a 'victory' for the employers, because the prevailing opinion in jurisprudential theory had previously inclined towards the application of section 615 of the Civil Code [which was favourable to the employee] rather than section 323 [which was favourable to the employer]. The *RAG* was therefore presumed to have established a principle which would operate against the employee. In the practice of the *RAG*, however, the principle has in fact operated in most cases against the employer. The situation might be summed up in the following way: the decision went against employees as a whole in principle, and in favour of the individual employee in practice. This state of affairs is not unique. In another question of considerable practical significance, the *RAG* established a fundamental principle which corresponded to the standpoint of the employers, but which in practice was consistently applied in favour of the individual employee. We are referring here to the so-called 'renunciation of collectively agreed wage rates' (*Tariflohnverzicht*). Under clause 1 of the Collective Agreements Order (*TVO*), an employee is not allowed to waive his right to the payment of collectively agreed wage rates in the future, but he can waive his right to the payment of collectively agreed rates in the past by accepting wages below the agreed levels. The *RAG* affirmed this possibility of renouncing collectively agreed rates, against the advice of renowned academic lawyers, in the leading case of 4 January 1928,[41] but it did add that an 'intention to renounce' could not be inferred from the acceptance of wages below the agreed levels if this occurred because the employee was afraid that by demanding the collectively agreed rate he would be risking dismissal. The *RAG* has applied this interpretation in 21 reported decisions.[42] In only one of these cases did the Court decide that there had been no economic pressure on the employee and therefore find in favour of the employer.

It is symptomatic of the whole approach of the *Reich* Labour Court that it is positively inclined to have regard for the interests of the employee in individual cases, but that it can only bring itself with difficulty to decide in favour of employees when it is concerned with a fundamental principle about which there is a major disagreement between the employers' associations and the trade unions.[42a]

The Works Bond and Its Effect on the Obligations of the Employee: Overtime

The idea of the works bond has a practical effect in yet another direction, and in this case it operates directly against trade union action, albeit via the circuitous route of the contract of employment. We are referring here to the question of overtime.

Although the basic principle of the eight-hour-day has been established in clause 1 of the Decree on Working Time (*AZVO*) of 21 December 1923 as amended on 14 April 1927, the Decree does allow for a number of exceptions. Under clause 5, for example, the working day can be extended to 10 hours by collective agreement, and under clause 3 the employer has the right after consultation with the works council, to demand that employees in a particular works or department work up to ten hours on any one of up to thirty days of his own choosing in a year. In accordance with prevailing jurisprudential opinion, the *RAG* has consistently taken the view in its decisions that these provisions come under the ambit of public and not private law, in other words that they impose an obligation on the employee to work overtime only if such an obligation is also incorporated in his contract of employment. The reason for this principle is simply to allow the employer to introduce overtime (with the agreement of the employee) without it being a punishable offence. The *RAG* has also rejected Kaskel's theory that even though the provisions of the Decree on Working Time are part of public law, the maximum permissible hours of work should be deemed to have been automatically incorporated in the contract of employment.[43] Having adopted this point of view, it would at least have been consistent if the Highest Court had given the employee the right to refuse to work such overtime as had been unilaterally determined by the employer, even if the employer's action was permissible under public law. However, the *RAG* did not draw this conclusion. Initially it did actually affirm the employee's right to refuse to work overtime. This was in a case where the employer wanted the employees to work more than eight hours on some days and less on others,[44] that is where the proposed arrangement was in fact permissible under public law as it did not infringe the 48-hour week. But the *RAG* subsequently changed its interpretation, initially in its decision of 12 December 1928.[45] The *RAG* began by re-affirming its previous view that clause 3 of the Decree on Working Time is part of public law and that not all statutorily permissible possibilities of overtime working would be automatically incorporated in the contract of employment. However, the *RAG* continued, even in cases where there was no explicit agreement between employer and

employee, an obligation to work overtime could arise out of the basic principle of the works bond, according to which it is incumbent on a worker to contribute to the advancement of the economic prosperity of the works. Thus, in certain circumstances, the employee could find himself under an obligation, simply by entering the employment relationship, to put his labour power at the disposal of the employer to perform, within reasonable bounds, such overtime as the employer determined was necessary in the interests of increased production. As a result of this decision a works councillor, who had refused to work overtime in the belief that he had a right to do so under public law (this public-law view had been suggested to him in trade union training courses), was subsequently held by the *RAG* to have been justifiably instantly dismissed for 'persistent refusal to work' (*beharrliche Arbeitsverweigerung*). However, the *RAG* did not stop there. The decision of 19 June 1929[46] also involved the refusal of a works councillor to do overtime in accordance with clause 3 of the Decree on Working Time. In this case, too, the *RAG* affirmed the employee's obligation to work overtime by reference to the works bond, but it went even further by refusing to place an obligation on the employer to prove that the overtime was economically necessary. It was held to be sufficient that the employer had considered it necessary to intensify work for a short period; it was felt that to require him to give concrete proof, to prove the objective necessity for overtime, would prejudice the legal position of the employer, who has a duty to manage the works and assess the state of the business cycle. Thus the *RAG* has once again applied the viewpoint of the 'works bond' to the detriment of the employees, this time by revoking the fundamental principle which the working class has passionately fought for and which the Court itself had previously accepted, namely the eight-hour-day.[47]

If we stop here a moment, we can see that the *RAG*'s idea of a 'community of production' between employer and employee is used not only to spread the so-called risk, but also to burden the employee with the performance of additional services, to oblige him to put more of his labour power than was collectively agreed in the service of a works in whose profits he has no share. We also see that, by reference to the idea of the works bond, the *RAG* has nullified a fundamental principle of the law of contract – that obligations of performance can only be established by mutual consent – and sanctioned the dictatorial power of the employer, a dictatorship which cannot even be called 'enlightened' since it has no need to provide its subjects with adequate reasons for the measures it takes. And while on the other hand the employer can take a unilateral decision to order overtime without any need to prove

that it is objectively necessary (see the last cited decision), the employee must always prove in matters of works discipline that he has acted within his legal rights. As we shall show in the next section, if he 'insists on his legal rights', he risks instant dismissal for persistent refusal to work.

This aspect of the case law of the *RAG* is emphasised here not because it shows evidence of a point of view favourable to the employer or to the employee, but rather because it demonstrates with the greatest clarity the shadowy and unreal nature of the 'community of production'. In practice, this community of production is one in which the employee makes all the sacrifices, because the very person who represents this community to the outside world and who protects the 'interests of the community' is identical with the social adversary of the employee. This clearly demonstrates that there is no such thing as a higher third interest, in whose service the employer and the employee work together, but that the interests of production are in fact the interests of the employer.

Works Discipline and the Unrestricted Right of the Employer to Manage: the Concept of Persistent Refusal to Work

So far we have concentrated on the practical effect of the 'community of production' (or works bond) on the individual employment relationship in the area of the works risk and the obligation to work overtime. It is now necessary to examine another group of ideas which plays a crucial role in the decisions of the *RAG* concerning the individual employment relationship, that is, the idea of works power, works discipline or the 'right to manage' (*Direktionsrecht*).

The decisions of the *RAG* give the employer the so-called right to manage, which gives him the authority to determine unilaterally the rules governing relations at works level. It also places an obligation on the employee to obey the instructions of the employer. One of the most difficult questions in labour law is to draw the line between the employer's sphere of authority arising out of his right to manage and the sphere regulated by mutual agreement as embodied in the contract of employment, i.e. the answer to the question of what work and behaviour can be required of an employee in the absence of explicit contractual obligations, in particular the extent of the employee's duty to perform tasks which have not been expressly embodied in his contract. It is characteristic of the decisions of the *RAG* that the employer's right to manage, his powers of authority and discipline, are given an extraordinarily extensive interpretation. The employer can require an employee to perform any task as long as it is not linked to a reduction in wages nor represents a disciplinary punishment.[48] However, the subordination of the employee to the instructions of the employer goes

even further. If the employee believes that he is under no obligation to perform a task required by the employer, and if, in just one instance, he refuses to work in the belief that he is not obliged to do so, then he does this 'at his own risk'. If the Court subsequently decides that he wrongly refused to perform a specific task, he is then guilty of 'persistent refusal to work' and the employer's decision to dismiss him instantly was justified. The *RAG* requires that the employee does not 'insist on his legal rights', that he does not 'adhere rigidly' to his view of the law, and, if he does do this, he is considered to be acting 'at his own risk'. Apart from the decisions on the question of the 1 May celebrations, which have been discussed above, the following cases typify the *RAG*'s approach.

A manual employee (a works councillor) had worked overtime. According to a works agreement (*Betriebsvereinbarung*), the existence of which was maintained by the appellant, a manual employee who worked overtime had the right to a corresponding amount of time-off in the period up to the end of the week following the overtime. On the day before the last day on which this was possible, the appellant asked the foreman to let him have the next day off, but this was refused. In spite of this, the appellant took the day off, and was instantly dismissed, with the subsequent approval of the *RAG*.[49] The *RAG* argued that the individual employee was under an obligation to comply with the instructions of the works management, and that it was irreconcilable with the smooth operation of a works that every employee should act according to his own volition rather than according to instructions, and thereby question the discipline (which must govern relations at works level) and, by implication, the whole operation of the works. The *RAG* went on to argue that this applied particularly to works councillors, who were obliged, among other things, to actively promote the orderly operation of the works. This 'military discipline' view of the employment relationship is evident in numerous other decisions. As early as the decision of 17 November 1927,[50] the *RAG* declared that, because of the need for works discipline, an employee who refuses to carry out an employer's instructions, even if they are unlawful (in this case a decision to regulate hours of work unilaterally), is guilty of persistent refusal to work. In the decisions we have mentioned above of 12 December 1928, 29 May 1929 and 19 June 1929,[51] this basic principle concerning the 'insistence on one's own legal rights' and 'acting at one's own risk' and the obligation of the employee to submit to works discipline, are very strongly underlined. This is also true of the decision of 12 January 1929.[52]

In the case of 12 December 1928, the works councillors had taken the view, based, as we have already mentioned, on trade union training

courses and after consultation with full-time officers of their union, that they were not obliged to work overtime. The *RAG* rebuked them for regulating their behaviour according to an interpretation of the law which they knew, or which they should have known if they had taken the customary care required in the conduct of legal relations, could also be interpreted in the opposite way. If they chose between the two well-known views and selected the one which was most favourable to them, then they were acting at their own risk and would have to accept the consequences if their view was subsequently shown to be incorrect. A similar approach was adopted by the *RAG* in its decision of 29 May 1929, when it argued that the employee must accept the consequences if an interpretation he selects subsequently proves to have been incorrect. The belief, in good faith, that he is not obliged to perform a specific task which the employer instructs him to do, does not exonerate the employee from all fault, and does not prevent the employer from lawfully dismissing him instantly for persistent refusal to work. This is perhaps most clear in the decision of 19 June 1929, discussed above, in which the idea of works bond is very closely linked with that of works discipline.

In these cases, the *RAG* is expressing its disapproval of the active pursuit of their rights by workers at works level. The *RAG* allows the employer to exert an extensive dictatorial power over his employees, and is guided in this approach by the idea of discipline, which is necessary in the interests of production and, as the Court continually stresses itself, is closely linked to the idea of the works bond. When taken together, the concepts of works discipline, organism and production community constitute an almost romantic-military system of ideas. Employer and employees are bound together in an organism, forming a work community which demands the voluntary subordination of the one under the command power of the other in the interests of their common aim, i.e. productivity. In all this, the economic side of things is totally ignored, and no attention is paid to the fact that the so-called community is economically non-existent. It cannot be argued that all we are dealing with here is the achievement of the unified management control necessary in any large, rationalised, capitalist works. The 'management' (*Leitung*) is conceived by the *RAG* as a value in itself, situated beyond the economic sphere, as a thoroughly irrational entity in whose interests 'discipline' must exist. In other words, what the *RAG* is protecting is not only economically necessary labour discipline, but also the subordination of human beings at work.[53]

Through these decisions the *RAG* has created a sphere in which the employer can deploy his power unhindered, and it does not even require him to give any kind of objective economic justification for the assertion

of this dictatorial power or the use to which it is put (cf. the decision of 19 June 1929, discussed above). On the other hand, the *RAG* condemns most strongly the use of a 'policy of prestige' by the trade unions, and recognises the deployment of trade union power as legitimate only when it can be justified in terms of objective economic necessity. While, therefore, the *RAG* intervenes in the activities of the trade unions and the works councils by subordinating them to a superimposed higher interest (respectively, the maintenance of economic peace and the idea of a community of production), it rejects any regulatory control of the deployment of power by the employer at works level. The idea of discipline replaces the element of objective regulation. This is a fundamental contradiction which we must keep in mind. On the one hand, the regulatory tendency, on the other, the rejection of regulatory intervention.[54]

The Employment Relationship Redefined in Terms of Public Service: Discipline, Loyalty, Bond with a Specific Position, Obligation to Contribute to a Pension Fund

The attitude of the *RAG* towards the individual employment relationship has one further important aspect which has not been mentioned and which must be discussed sociologically. The *RAG* has correctly departed substantially from the Roman Law view of the employment relationship as a contract between equals. As we saw in the previous section, it has given an expansive interpretation of the disciplinary power of the employer over the employee, and has viewed the relation between the employee and the employer not as one between equal contracting parties, but as one of subordination and domination. It has replaced the clearly defined obligations of performance, a fundamental characteristic of the contract between equals, by a general subordination of one contracting party to the will of the other. To a large extent, therefore, the *RAG* has made the employment relationship subject to basic principles which apply to the public service relationship. It is customary to see the relationship between the public servant and the state not as a contract, but as one in which the public servant accepts a particularly far-reaching personal subordination and the state recognises an obligation to maintain and support the public servant. In this case we are not concerned with performance and equivalent performance, but with mutual obligations of loyalty on the one hand and welfare provision (*Fürsorge*) on the other. The *RAG* tends in all respects towards a definition of the employment relationship in terms of public service (*Verbeamtung des Arbeitsverhältnisses*). This applies to the enlargement of the disciplinary power of the employee, discussed above, as well as to other areas.

Consider the decision we have discussed above relating to the case of a works councillor who had distributed leaflets outside the factory.[55] If this case is taken together with another one,[56] in which a works councillor placed some strike leaflets in the washroom during working time and was dismissed with the subsequent approval of the *RAG*, then we can see that one aspect of the law relating to public servants has entered into these decisions, namely the point of view that the public servant is not only obliged to submit to discipline during working hours, but that, over and above this, he must also demonstrate a degree of loyalty to his employer in his behaviour outside working hours. It should be said that the Court is only just beginning to develop such an interpretation, initially in decisions relating to works councillors. However, this tendency is consistent with the general trend of the judgments of the *RAG*, and it would not be surprising if, in the near future, the *RAG* proceeded to examine the behaviour of employees outside 'hours of service' (*Dienstziet*) in order to check whether they were observing the obligations of loyalty owed to the employer.

Disciplinary subordination and obligations of loyalty are not the only indications of the redefinition of the employment relationship in terms of public service. A fundamental characteristic of the public servant (*Beamte*) is his bond with a specific position, with an 'office' (*Amt*). This right to an office can only be withdrawn from the public servant under certain statutorily defined circumstances. The manual worker has no general right to a specific position. However, the *RAG* has been extending the idea of public service in this direction, and indeed predominantly in favour of the employee. In this context, the decisions of the *RAG* relating to protection against dismissal, which will be discussed below, are very important. Under the Law of Protection against Dismissal (*KSG*) of 9 July 1926, the salaried employee who has worked for a certain period of time for an employer or his legal successor is guaranteed a minimum notice of dismissal. A large amount of case law exists relating to the concept of legal predecessor or conversely legal successor.[57] The basic idea underlying these decisions is that the protection of older employees against dismissal is derived from the works bond, and that therefore what is important is not so much the relation between the salaried employee and a particular employer but his integration into a particular works organism. For this reason, the *RAG* gives a very broad definition of legal succession, interpreting it as any event as a result of which the works as an organism survives, even though there might be a change in the employer or in the legal form of ownership. This also demonstrates what we have characterised as a redefinition in terms of public service, since the *RAG* has clearly stated that the fundamental basis of the employment relationship is not the contractual

relationship with the person of the employer, but the integration of the employee into the works organism and his bond with a specific position. The *RAG*'s strong inclination to stress the concept of position or post can be seen from a decision of 27 February 1929,[58] in which the Court argued that it was not within its power to examine the question of whether, in a case where works councillors were made redundant as a result of a partial works closure, an individual works councillor could not have been offered a job in a department which had not been closed. Here also the decisive factor is the 'bond with the position'. When the position finishes, so does the employment relationship.

This tendency to bind the employee to his position is supplemented by the extensively interpreted concept of welfare provision (*Fürsorge*), which will be discussed further below. This bond between the employee and the works is most clearly expressed in the two decisions of 27 October 1928 and 25 November 1929,[59] which relate to the question of pension funds. Both cases concerned the existence of compulsory pension funds. In the first decision, the Court had to answer the question of whether it would be more 'advantageous' to a shop assistant in a pharmacy to be paid his full wages (as was his right under the Collective Agreements Order (*TVO*)) or to be paid his wages after the deduction of a contribution to the pension fund. The *RAG* declared that the deduction was more 'advantageous' to the employee. The fund served to raise the position of his whole *occupational status group* (*Stand*), and the obligation to save (*Sparzwang*) was better for the young chemist's assistant than the immediate advantages of higher money wages. In the second decision, the question to be resolved was whether a compulsory pension fund was against public policy in cases where a young employee had no right to the repayment of his contributions if he left the works before a certain minimum period of time. The *RAG* considered that such regulations relating to pension funds were not against public policy if judged according to the 'generally understood interests of the individual employee'. In this case, as well, the deduction of contributions to the fund, which makes payments under its own rules and not by force of law, was considered to be more advantageous in terms of the *TVO* than the full payment of wages. The basic approach of the *RAG* to the individual employment relationship becomes completely clear in these decisions. The young man should save, stay as long as possible in one works and perform his services in loyalty and subordination to the employer. In return, the employer should treat him well and afford him the corresponding welfare provision. While at work, the employee should behave peaceably and not 'insist on his rights'; if he requires something from his employer, he should preferably ring up the local labour tribunal.

He should seek protection from the trade union, but it should only organise industrial action against the employer if such behaviour is justified from the point of view of overall economic peace as defined by the courts. In all other respects the whole relationship should be characterised by the idea of disciplined harmony. This definition of the employment relationship in terms of public service has two distinct ideological sources, the one romantic and military, the other decidedly petty-bourgeois.

The Individual Employment Relationship under Fascism

A number of basic elements of fascist ideology have been revealed in the decisions of the *Reich* Labour Court relating to the individual employment relationship: the regulatory tendency in the interests of economic peace, the idea of the bond between employee and employer in the interests of production, and most assuredly the idea of discipline and the tendency to define employment in terms of public service. Fascism has long since disavowed its heroic past, its roots in Sorel's syndicalist activism. Today, it has a welfare-state approach, it dispenses with fine words about freedom and the constitution; instead, it affords welfare provision to its subjects if they maintain discipline and order.[60] Co-operative labour in the interests of production is recognised as the basis of the whole employment relationship in Article 7 of the *Carta del Lavoro*.[61] The tendency to define employment in terms of public service is inherent to fascism: this can be shown by the fact that, alongside the idea of extensive social welfare provision, work is declared, in Article 2 of the *Carta del Lavoro*, to be a social obligation, not just a contractual obligation towards the employer. This leads to a situation in which fascism as well as mercantilism must tend to turn the employment relationship into a 'kind of public service relationship', with all the attendant consequences for the parties involved.[62] However, in one respect, fascism has not done what the *RAG* consistently attempts to do, that is, to link the disciplinary subordination and the redefinition of employment in terms of public service with a superimposed organic 'essence', namely the works (*Betrieb*). Fascism links them to what it calls the general national duty of both employee and employer. But it would be wrong to regard this difference as a decisive one, if we remember that the concept of 'works organism' as used by the *RAG* is simply a verbal construct with no real meaning. What the *RAG* is doing amounts ultimately to what fascism wishes to do. The employee's obligations at work should no longer be based on a contractual duty to perform certain tasks, but on a disciplinary subordination to a higher interest. The person who upholds this higher interest in relations with the employee is

always the employer, and it is always identical with the ownership interests of the employer. Whether this disciplinary subordination is justified with reference to the concept of the 'organic works' or of the 'national interest' is a relatively minor question of terminology. What is decisive is the subordination and the bond with a specific position as well as the bond between employer and employee in the interests of a supposed higher third party. In these decisive points fascist ideology is completely in accordance with the social ideal of the *RAG*. Finally, we must point out in this context that the concept of works is not alien to fascist ideology, even if, as we have shown above, the term 'works organism' is not actually used in Italian employment legislation. Fascist law (*Carta del Lavoro* Art. 7(2)) also proclaims the principle of co-operation, and decrees that the mutuality of rights and obligations existing between employers and employees is derived from the co-operation between the different forces of production. 'The employee (technician, clerical worker and manual worker) is an active working member of the enterprise, whose management is in the hands of the employer, who bears the responsibility for it.' This sentence could have been taken word for word from the decisions of the *RAG*. It shows that here too the idea of the works bond is intimately connected with the idea of discipline, even if it has not resulted in a systematic development of a concept of 'works', as in the decisions of the *RAG*.

The Individualistic Idea of Welfare Provision in Judicial Decisions

This examination of the social ideal of the *RAG* has so far given only an incomplete picture. For it is of crucial importance that the tendencies of the *RAG* to intervene in collective conflict and to transform the individual employment relationship are accompanied by a commitment to social welfare provision for needy human beings as individuals. It would be quite mistaken to conclude from our study thus far that the *RAG* is in general more favourably disposed towards the employers. The *RAG* fully understands the situation of dependency in which the employee finds himself. It fully understands the need for social protection and in no way subscribes to a Manchester-style liberalism or to an untenable concept of equality. But it must be said that its approach is purely paternalistic and individualistic. The *RAG* wishes to protect the individual human being in need, but it opposes the oppressed class when it attempts to better its position by its own action. It is not possible to give a complete picture of the social development of individual labour law undertaken by the *RAG*. We must be content with citing a few characteristic examples.[63]

The Concept of Dependency: Agents and Salaried Employees

The *RAG* understands the typical situation of the employee, that is one of economic and personal dependency, in economic and social terms. This can be seen clearly in its decisions concerning the distinction between salaried employment and an 'agency relationship' (*Agenturverhältnis*). While the salaried employee is covered by protective social legislation, the so-called free agent has no claim to any social protection. A large number of employers have thus attempted to make employment relations, which are in economic and social terms those of salaried employment, appear to the outside world to be agency relations by putting economic pressure on the employee to sign a contract which is termed an 'agency contract'. The *RAG* has refused from the very beginning to treat such relations as agency relations, and has often gone much further than the lowest appellate tribunals in widening the scope of the concept of salaried employee as opposed to the concept of 'agent'. In doing this, the Court has rightly stressed the crucial importance of the concept of economic and personal dependency, i.e. the subordination of salaried employees to the instructions of the employer. In recent decisions, it has also placed particular emphasis on the general economic position of those employees who are 'representatives' (*Vertreter*) of the employer.[64] These judgments are of extraordinarily great practical significance. Indeed, it can be argued that the *RAG* has forced whole branches of trade and industry which are predominantly based on exploitation to adopt a new approach to their staff. As a result of these decisions, all those large and small firms which employ dependent staff to sell products (such as household goods) in return for a meagre payment are now compelled to change and adapt to this new situation. Socially, a very gratifying outcome.

The Idea of Welfare Provision for Older Salaried Employees: the Application of the Law of Protection Against Dismissal

The commitment of the Highest Court to social welfare provision again proves crucial in cases of protection of the old, the sick and the disabled, that is, people in need of help for individual reasons. The social tendency of the *RAG* is also evident in cases concerned with the maintenance of the health of the individual through recuperative holidays. For these reasons, the outstanding examples which characterise the social tendency of the Highest Court are the decisions on older salaried employees (protection against dismissal), the severely disabled, the partially disabled, and on holidays.

In its interpretation of the Law of Protection of Older Salaried Employees against Dismissal (*KSG*), the *RAG* has consistently stressed the

social policy objectives of the Act, with the result that it has made far-reaching provision for those older salaried employees in need of social protection. Firstly, we would refer to the decisions[65] of the *RAG*, already mentioned above, on the question of legal succession, in which it has given a very broad interpretation of the rights of the employee to personal protection resulting from the theory of the works bond. We would further refer to the fact that the *RAG* has not insisted on the need for uninterrupted employment in the same works in the calculation of the qualifying period which must accrue before an employee is covered by the Act. Instead, it is sufficient if there have been several periods of interrupted employment in the same plant, so long as there is some connection between them. It is worthy of note that the *RAG* has justified its decision with explicit reference to the need for 'social justice'.[66] The *RAG* has further decided that the time which a salaried employee has spent in the same works as a manual worker should be included in the calculation of the qualifying period, an interpretation which is of great practical significance for foremen and other salaried employees in industry. In the leading case of 7 December 1927,[67] the *RAG* declared that statutes affording social protection such as the *KSG* should not be interpreted in a restrictive fashion, like laws which only operate in exceptional circumstances, and that, in interpreting the statute, an attempt should be made to fulfil its underlying social purpose. The statute, so the *RAG* argued, is but one part of a general development of the law, one step further on the road to the provision of social welfare for the employee as the (in economic terms) consistently weaker party. These three sets of decisions relating to the *KSG*, which could be augmented by further examples, should be sufficient to demonstrate the main points at issue here, namely, the tendency of the *Reich* Labour Court to recognise the need for social protection of the employee, and the idea of welfare provision which underlies its decisions.

The Idea of Welfare Provision for Victims of War and Production: the Application of the Law on the Severely Disabled

The same trend can be seen in the decisions relating to the Law on the Severely Disabled. Here, the *RAG* has exercised its powers so freely that it has actually on one question provoked an open conflict with established legal doctrine. In fact, justifiable doubt has been cast on whether its decisions on the question are consistent with the text of the statute. The severely disabled, i.e. persons who have been declared more than 50% unfit for work as a result of war injuries or accidents at work and have been awarded a disability pension, enjoy a dual protection under the law. Firstly, employers with a workforce of more than a minimum size are obliged to engage a specific number of severely disabled

persons. If an employer fails to fulfill this obligation, the Central Welfare Office, which is charged with the protection of the severely disabled, can assign severely disabled workers to him. The second element of protection relates to the conditions under which a severely disabled employee may be dismissed. If no reason for instant dismissal exists, then the severely disabled employee may only be dismissed with the agreement of the Central Welfare Office and with a minimum of four weeks' notice. The *RAG* has given its reasons for this interpretation of the Law on the Severely Disabled in several decisions, e.g. in those of 9 May 1928, 19 January 1928 and 8 June 1929.[68] Contrary to prevailing legal doctrine, the Court decided that, as long as the employment relationship continues to exist, the severely disabled person has a right to payment by the employer of the agreed wage or salary for the full duration of any illness which results from his disability. In support of this interpretation, the *RAG* made reference to the overall structure of statutory protection for the severely disabled. It argued that the purpose of the existing statute was to transfer part of the state's duties under public law to the employer, and that, from this viewpoint and from the viewpoint of the works bond, the severely disabled person has a right to a livelihood from the employer irrespective of his actual performance at work. There is a very clear connection between the ideas of the works bond, of welfare provision and of the employment relationship as one of public service, and these decisions of the *RAG* show just how much the whole practice of the Highest Court is permeated with a unified social ideal. We would emphasise once again that it would be completely wrong to explain these ideas of the *Reich* Labour Court as somehow originating in a basically pro-employer stance. These decisions relating to the Law on the Severely Disabled, which are in all probability incompatible with the wording of the statute, show that the tendency of the Highest Court to stress petty-bourgeois ideals and the idea of public service and economic peace can also operate against the interests of the employers, for example, when the Court transforms the works into an institution of welfare provision. It is these decisions of the *RAG*, more than any others, which have met with the greatest resistance of the lower appellate tribunals (for instance, the regional state labour tribunal in Berlin). In fact, they can no more be justified in law than the doctrine of works risk, with which they are intimately connected, both systematically and ideologically. Both are sustained, like the decisions on works discipline, by a kind of individualistic romanticism and by an approach to employment relations based on paternalism and welfare provision. This in turn shows the close links between the social ideal of the *RAG* and the ideology of fascism.

The basic attitude of compassion towards the disadvantaged individual

is also expressed in numerous other decisions of the *RAG* on the statutory rights of the severely disabled. When the *RAG* rightly rejects the plea of the employer that he did not know of the disability of a particular employee,[69] when it also extends the rights of protection against dismissal to severely disabled workers in small plants which are not covered by the statute,[70] when it generally refuses to investigate the decisions of the administrative authorites which specifically relate to cases of severely disabled workers,[71] then these are all interpretations of the Law on the Severely Disabled which are sustained by a tendency towards social protection. On the other hand, the *RAG* has declared that there are clear grounds for instant dismissal if a severely disabled person goes on strike or is locked out by the employer; over and above this, it has declared that the severely disabled employee may be instantly dismissed 'for a substantial reason' under section 124 of the Industrial Code (*GewO*),[72] and also in cases which do not fall under section 123 (*GewO*). What is important here is not the detail of the decisions of the *RAG* on the protection of the severely disabled, but their overall tendency. This is confirmed by the Court's interpretation of the collective agreements which give the employer the right to pay persons who are more than 50% unfit to work less than the collectively agreed wage. In fact, the *RAG* has always interpreted such agreements in the employee's favour.[73] Here again, it is the protection of the sick individual in need of help which has been uppermost in the mind of the *RAG*. However, it goes without saying that the *RAG* is not only motivated in these decisions by natural compassion but also by an element of patriotic fervour. In addition, these decisions are influenced by another idea which has an affinity with fascist ideology, namely, that it is the duty of the community as a whole to provide for those who have made sacrifices in the interests of the nation (those disabled in war) or in the interests of production (those disabled by industrial accidents).

The Idea of Recuperation: the Application of Collectively Agreed Provisions on Holidays

Finally, we would like to discuss in this context the decisions of the *RAG* on holidays. Under present German law, there is as yet no statutory right to recuperative holidays. On the contrary, rights to holidays are based at present exclusively on collective agreements. We shall be concerned, therefore, throughout this discussion of holidays with problems of the interpretation of collective agreements. The decisions of the *RAG* on this matter are numerous and cannot be examined here in detail. We want only to point out that the *RAG* has come to a series of decisions which grant the employee extensive protection and give a special emphasis

to the idea of recuperation (*Erholung*) and the social purpose of holidays. The *RAG* has repeatedly stressed[74] that the purpose of holidays is to allow the employee to recuperate. Since the employee is not in a position to provide for this recuperation from his own resources, collective agreements which include provisions on holidays give the employee a dual right, firstly to be given time off work for a certain period and secondly to be paid during this period.[75] For this reason, if an employee leaves his job without having taken the holiday due to him, the *RAG* gives him the right to payment for the holiday period so that he can afford to recuperate.[76] This is the case even where the employee has been justifiably summarily dismissed, always, of course, so long as the collective agreement contains no clauses to the contrary. The commitment of the *RAG* to the idea of welfare provision is demonstrated in these and also in numerous other decisions on holidays. For example, when the *RAG* prohibits the employer from deducting sickness benefit from the holiday pay of an employee who becomes ill during his holiday;[77] or when it concedes the employee's right to a holiday, even if he has become ill during the period of notice of dismissal during which he should have been allowed to take his holiday;[78] or when it even grants him the right to a holiday after he has broken his own contract of service by leaving his job;[79] or, finally, when the *RAG* prohibits the employer from taking unemployment benefit (accruing to the employee as a result of his dismissal) into account when calculating the amount of his lump-sum holiday payment.[80] All these decisions clearly express the commitment of the *RAG* to the idea of individual welfare provision.

The Idea of Individual Welfare Provision in Fascism

The tendency of the *Reich* Labour Court towards welfare provision, which, as we have shown, is directly connected with the idea of the works bond and the public service view of the employment relationship and has an obvious ideological link with the idea of discipline, has a direct parallel in fascist legislation. According to Article 26 of the *Carta del Lavoro*, welfare provision is an expression of the principle of collaboration ('La previdenza è un 'alta manifestazione del principio di collaborazione'), and in Articles 11ff., which establish the compulsory effect of the terms of collective agreements, welfare provision plays a role very similar to that envisaged by the *RAG*. Thus, for example, Article 16 establishes a right to a holiday after one year's uninterrupted work in a particular plant. According to Article 17, just as under section 87 of the Law of Works Councils (*BRG*), the employee must be given a severance payment if he has to leave his job through no fault of his own, a payment which is proportional to the number of years he has worked

in the plant. And in this context it is particularly important that, according to Article 18, the contract of employment is not dissolved if the ownership of a works is transferred to another employer: the workforce retains its rights in relation to the new employer (cf. on this matter the decision of the *RAG* on the Law of Protection against Dismissal). There is a direct connection between these measures of welfare provision, the legislation which enforces the bond between the employee and the works both to his advantage and to his disadvantage, and that section of the *Carta del Lavoro* which states that breaches of discipline and acts committed by employees which disturb the normal running of the works are punishable according to the gravity of the misdemeanour, either by a fine, by suspension or in the most serious cases by instant dismissal (Art. 19(1): 'Le infrazioni alla disciplina e gli atti che perturbino il normale andamento dell 'azienda, commessi dai prenditori di lavoro, sono puniti secondo la gravità della mancanza con la multa, con la sospensione dal lavoro e, per i casi più gravi, col licenziamento immediato senza indennità'). It is worth noting that the system of penalties is identical to that of the German statutes relating to public servants: breaches of discipline create a liability to penalties ranging from fines and suspension to dismissal from service. The overall approach of the *Carta del Lavoro*, its ideals of welfare provision, public service and discipline, is thus completely in accordance with the judicial interpretations of the *Reich* Labour Court.

The Arbitration System and the Labour Magistrature in Italy

The system of fascism culminates in the idea of the replacement of industrial conflict by the judicial activity of the state. The *Magistratura del Lavoro* (Law of 3 April 1926, s. 13ff.) was established in order to replace the strike and the lock-out. The labour magistrature is expected to achieve this objective in two ways, either through the settlement of disputes about existing conditions of employment, or through the creation of new conditions of employment by collective regulation in the manner of our arbitration authorities. Every arbitration system which aims to eliminate or limit industrial conflict needs to be supplemented by the introduction of an (in theory) neutral third party in order to regulate conditions of employment; according to the theory of collectivism, this should of course be left to the conflict between trade unions and employers' associations. The German system of state arbitration, which allows for arbitration awards to be declared compulsory (clause 6 of the Arbitration Decree (*SchlVO*) of 30 October 1923),

has nothing directly in common with such an approach. In contrast to the English system of arbitration, ours is not simply a system of dispute settlement, indeed, the prevention and termination of disputes is not even its principal purpose. On the contrary, the concept of arbitration which underlies our Arbitration Decree is completely new. Arbitration no longer means the prevention or settlement of industrial disputes, but assistance in the achievement of collectively regulated conditions of employment (*SchlVO*, clause 3). The idea behind the Decree is to supplant the dispute-avoiding function of arbitration and to give the arbitration system the primary task of creating new collective employment rights and conditions. Of course it goes without saying that, under this new system, the arbitration authorities also contribute indirectly to the settlement and prevention of disputes through the very act of creating new employment conditions. But our concern here is not with the practical effects of the arbitration system but with the idea underlying it. What is crucial for our analysis is that the state's primary purpose in establishing the present system of arbitration was not to prevent industrial disputes but to assist in the creation of collectively regulated conditions of employment.

However, the moment arbitration becomes inextricably bound up with the concept of the so-called 'overall dispute' (*Gesamtstreitigkeit*), it starts to move away from the basic idea underlying the Arbitration Decree (*SchlVO*) of 1923 and becomes more like the English concept of arbitration, on which the now repealed Part III of the German Collective Agreements Decree (*TVV*) of 23 November 1918 was based. This idea of dispute-preventing or dispute-avoiding arbitration has a basic affinity with the idea behind the labour magistrature in Italy. For, to the extent that its task is to develop new conditions of employment rather than to interpret existing agreements, the *Magistratura del Lavoro* is also an arbitration system in the service of economic peace. Every system of arbitration, which is either coupled with a ban on industrial action or which sees its main purpose as the settlement or termination of labour disputes, belongs to this general tendency. Only when we have clearly grasped the sharp distinction between the German concept of law-creating arbitration and the concept of arbitration as an instrument of economic peace can we possibly draw the theoretical distinction between the idea of the labour magistrature in Italy and the German idea of the 'compulsorily imposed wage award' (*Zwangstarif*).

Seen from this point of view, the *RAG* has misunderstood the concept of arbitration underlying the German system of arbitration. What it has done is to tie the operation of the arbitration system to the existence of an 'overall dispute', most notably in the famous judgment in the case

brought by the North-West German Group of the Metal Industry Employers' Federation[81] and in the other decisions which have rejected the possibility of a so-called 'intervention in collective agreements currently in force'.[82] The question which the *RAG* had to examine in these decisions was whether it was possible, via the compulsory imposition of an arbitration award, to change the terms of collective agreements currently in force against the will of the parties to that agreement. The *RAG* declared that it was not possible to intervene in collective agreements currently in force, and that a 'compulsorily imposed wage award' which intervenes in collective agreements in this way is null and void. The key sentence in the *ratio* of the judgment in the Ruhr iron dispute is: 'Only in cases where overall conflicts of interest (*Gesamtinteressen*) are unresolved or are not already subject to legal regulation, and where they are still in need of settlement, is there room for the arbitration authorities to fulfil the duty incumbent upon them to assist in the conclusion of an overall agreement (*Gesamtvereinbarung*)' (op. cit., p. 176, 177). In all the three decisions cited, the *RAG* stressed that a dispute about overall conflicts of interest is the precondition for valid arbitration proceedings. In its decisions, therefore, and contrary to the intention of the Arbitration Decree, the *RAG* has relegated the law-creating character of arbitration to a subordinate role vis-à-vis the dispute-avoiding or dispute-resolving function. If the *RAG* had recognised the clear line which distinguishes the German concept of arbitration from the idea of the labour magistrature in Italy, it would have had to allow intervention in collective agreements currently in force. By refusing to allow such intervention, it has given the German arbitration system an 'economic peace' function which was not intended under the law.

It must be admitted that the effect of this analogy between the decisions of the *RAG* and fascist legislation does not lie so much in the practical field as in the realm of fundamental principle. The basic significance of the 'intervention' decisions for our study consists in the fact that they limit the activity of the arbitration authorities to cases in which there is already a dispute between the parties arising from a conflict of interest. This means that the German concept of arbitration is in the process of being internally transformed into the idea of the labour magistrature, even if this idea does not play an important role in the practical, day-to-day activity of the German arbitration authorities.

Conclusions

In the introduction we stated that it was not the task of this study to

derive the ideology of the *Reich* Labour Court from an existing social situation. Such a task would require a deeper penetration into the overall economic and social situation than is possible here. The task was simply to reveal the ideology as such and show its points of contact with fascism. With this in mind, let us summarise the basic findings of the study.

In its pure form fascism involves the conscious realisation of a specific social ideal. This culminates in the idea of the maintenance of the capitalist economy and the peaceful collaboration of employee and employer in the interests of national production. According to this ideal, employer and employee are not conceived as isolated individuals, in fact, their combination into collective organisations is not only tolerated but also encouraged by the state. The task of these collective organisations is not only to represent the interests of one social group vis-à-vis their social adversary, but also to ensure the maintenance of economic peace. For this reason, industrial action is tabooed and replaced by a judicial procedure with a clear purpose, namely, to maintain economic peace. In the interests of production, the employee must submit to the discipline of the employer, and in return he enjoys, as an individual, extensive protection in terms of welfare provision. If these basic ideas are recognised as the core of the social system of fascism and if it is also recognised that these ideas can be shown to underlie the judicial practice of the *Reich* Labour Court (*RAG*), then it must be said that, with its own social ideal, the *RAG* is in all respects realising the social ideal of fascism. No one can blaim the *RAG* for aspiring to realise a particular social ideal. No one today can be foolish enough to expect a judge to claim that he is deriving decisions which relate to conflicts of a fundamental political significance from statutes which in reality contain no rules concerning such conflicts. What one has a right to expect from the *RAG*, however, is openness. What is missing in these decisions is the clear acknowledgement that the Court is pursuing a distinct socio-political objective. What is subjectively and objectively alienating and deplorable is the persistent attempt to claim that this highly political judicial practice is merely a matter of the application of statute law. As a result of this, the whole meaning of judicial practice is objectively masked, and its socio-political tendency is only revealed to the well-informed expert and the vigilant observer of the Court's activity. We refer here in particular to the questionable and unhappy statements in the decision on company balance sheets quoted above. It would go beyond the framework of this study to examine whether it is a fundamental characteristic of the judiciary always to defend its independence by concealing its political actions behind a veil of judicial objectivity.

For the reasons outlined above, it cannot be our task here to show the reasons for the phenomena we have described. We would only refer to the fact that perhaps the key to the approach of the *RAG* can be found in the tendency of all civil service bureaucracies to de-politicise and de-revolutionise the collective social forces.[83] To see conflict as something abnormal, as a disturbance of the regulated flow of social events, is as characteristic of the civil service bureaucracy as is their conception of the revolution [the November Revolution of 1918] as a simple breach of the law which should be reversed as soon as possible by emergency decrees and other similar measures.

In the fascist system, the judiciary is held to be capable of acting as a substitute for industrial conflict. If we recall the cases in which the *RAG* has passed judgment on the legitimacy of the aim of a strike, and if we further consider how strong and generalised is the tendency of the *RAG* to regulate collective conflicts rather than to protect the collective interests of employees, then we cannot fail to recognise that the tendency to develop the power of the judiciary over the parties to industrial conflict is the same as under the fascist system. With this conclusion we have come full circle. The judiciary, having long since overstepped the boundary which divides it from the legislature, is not only continually changing the content of statute law, but also attempting to subject the whole of social life to a new system of ideas. We should be fully aware of the extent of the power which is concentrated in the hands of the *Reich* Labour Court today. Since the beginning of its existence, i.e. in a period of about three years, the *RAG* has, with the aid of the case law established in previous decisions of the *Reich* Court, brought about the fundamental inner transformation of labour law. Labour law is now completely different from what it was shortly after the end of the 1914–18 War, in fact it has completely changed its character since the period of stabilisation [that is, since 1924]. If it was at one time an instrument to assist the rise of the suppressed class, it has now become in the hands of the *RAG* an instrument of the state to suppress class contradictions and to protect the individual. If before the First World War conservative forces engaged in social policy in order to keep the working class away from 'dangerous' revolutionary paths by state protection of the individual, state social policy today, particularly in its judicial dimension, is an attempt to keep the trade unions away from dangerous economic paths by the extensive social protection of the individual trade union member. All this is taking place, so to speak, behind closed doors. A small number of people, independent of the instructions of the administrative authorities and not accountable to the *Reichstag*, are able to intervene politically in a decisive fashion in

the life of broad groups of the population. The independence of the judiciary, at one time a guarantee for the individual against the encroachment of the administrative authorities and a protection against the arbitrary interpretation of statutes passed by parliament, represents today the most powerful breach of our system of parliamentary democracy. For, as a result of judicial independence, the civil service bureaucracy of the courts is in a position to achieve the realisation of its ideology, its ideal of bureaucratic discipline and welfare provision, over the main contending forces in society.

At the same time, the intellectual structure of labour law has changed. When Sinzheimer laid the intellectual foundations for German labour law in his two books published in 1907–08 and 1916,[84] labour lawyers were engaged in lively debate and the search for new legal ideas. The rejection of the concepts and models of Roman Law was a revolutionary act which facilitated the transformation of the property rights of the masses. Today, labour law has become intellectually paralysed. Some of Sinzheimer's great and new ideas have still not been understood; others have been adopted by most jurists, but in a diluted form. The idea of labour law as a law of persons (*Personenrecht*) has been transformed from an instrument of the suppressed class into an instrument of the civil service bureaucracy in the service of the petty-bourgeois ideal of economic peace.

What is most important, however, is the question of whether there are tendencies among employees themselves which are moving in the direction of the social ideal of the *RAG*. There is no doubt that such a trend has been furthered psychologically by the unavoidable involvement of the trade unions in the formation of state policy through their participation in arbitration committees, labour tribunals and social insurance bodies etc. However, this danger has arisen to a much greater extent because of the process of restructuring which has been taking place within the proletariat itself. As Emil Lederer has shown,[85] the German proletariat has undergone far-reaching internal changes since 1914. As a result of a change in production methods, the number of salaried employees has increased far faster than the number of manual workers, and the proportion of salaried employees in the overall workforce is much higher today than before the War. Consequently, the economic difference between salaried employees and manual workers has been completely obliterated, both as regards the intellectual character of their work as well as in the amount of their payment and their standard of living. In their living conditions, in their necessities of life and in the kind of social tension which exists between them and the employers, manual workers and salaried employees have come substantially closer together. But the

ideological division has remained as it was. Large groups of salaried employees still regard themselves as socially superior to manual workers. However much the economic and social facts of life disprove this, and even if, seen from outside, the tension between employers and salaried employees is certainly no smaller today than that between employers and manual workers, large groups of salaried employees, particularly those who are not organised, still feel a closer bond with the employer than manual workers tend to do. The class consciousness of salaried employees is still much more underdeveloped than that of manual workers, and the salaried employee still feels himself – in part because he actually does work more closely together with the employer and his immediate representatives – as part of a common front with the employer against the manual workforce. This is obviously a significant starting point for the development of a fascist ideology. These masses of salaried employees are much more susceptible than manual workers to the idea of economic peace coupled with some kind of welfare provision, and it would need a further study to investigate the extent to which there is a link between the ideological changes within the proletariat and the ideology of senior civil servants which finds expression in the decisions of the *Reich* Labour Court.

A further question which needs investigating is whether the labour movement is involved in an internal structural change which could be characterised as 'de-politicisation', that is, the tendency of the working class and the workers' parties to a one-sided economic orientation. It is an open question whether there is not only a reciprocal relationship between the tendency of the *RAG* towards economic peace and the restructuring of the proletariat, but also between these two phenomena and a structural change in proletarian thought and sentiment. The danger in the development of such a de-politicisation among the broad mass of the population, when combined with the social ideal of economic peace and welfare provision for the individual espoused by influential groups of civil servants, must be apparent to anyone for whom democracy means more than a formal legal institution. The political parties as bearers of the active political energies of the people receive their social imprint and thereby their political direction in our present society predominantly through the social organisations which stand behind them. If these social organisations are robbed of their fighting character, if an attempt is made to replace social conflict by the rule of the higher civil service, then with such a system of social dictatorship we would have also created the sociological and psychological preconditions for political dictatorship. The fact that both fascist and communist dictatorships have prohibited industrial conflict is surely no coincidence. If one

starts by making the collective forces into instruments of a fictional state will in the social field, one is preparing the way for the formation of state will in the political arena, not as an accommodation arising out of the conflict between the collective forces in society, but by the imposition of the will of a dictatorial civil service.

There are many roads which lead to dictatorship. However, the most likely road to fascism in our social conditions is not through force, but through the veneration of peace and order, of discipline and welfare provision, and above all through the ideological integration of the organisations of struggle into a hierarchically-ordered national community.

Notes

1. Max Weber, *Wirtschaft und Gesellschaft*, 2nd edition, pp. 397ff.
2. Our concern here is to use the terms of Heller in his book of 1927 on *Sovereignty* (p. 47ff.), to uncover the 'legal principles' (*Rechtsgrundsätze*) of the *RAG* as opposed to its 'legal rules' (*Rechtssätze*). However, we shall not be examining the origin of these legal principles. We are thus consciously *not* going to clarify the relation between the social norms applied by the *RAG* and the social facts, the social substratum, from which they are derived.

   We disagree with Heller's view in the way he characterises legal principles as either 'logical' or 'ethical'. It is true that, for Heller, legal principles of an ethical kind are culturally determined. However, his analysis does not bring out the fact that, in a society limited by time and space, totally opposed legal rules can have normative force at the same time. This fact must elude someone who regards all legal principles which are not logical as primarily ethical. In fact, they are not primarily ethical, but political and social, and are largely determined by the social position of the societal groups over which they have normative force. These legal principles do not have the character of natural law, as Heller seems to imply on page 128, they are of a political nature. Thus, at the same time and in the same place, the legal principles of employer groups in the field of labour law can be completely different from those of employee groups, which in turn can differ from the principles of the judicial civil service. In international law (cf. Heller, ibid., pp. 137ff.) it is recognised that different legal principles can exist in different nations. According to Article 38(3) of the Hague Convention, international judges must only apply the legal principles which are 'reconnues par les nations civilisées'. The international judge must not apply those political principles which are not common to all civilised nations (cf. on this issue Heller's criticism of the Geneva Protocol, ibid., p. 170). Just as in the field of international conflict the legal principles of the participants can be different, so this can also be the case in the field of domestic social conflicts. It is the task of the present study to show how the judicial civil service develops legal principles over and above the social parties.

3. Ludwig Bendix, *Gewisses und ungewisses Recht* (Leipzig, 1930) and in numerous other writings.
4. We have examined all the decisions of the *RAG*, insofar as they are contained in the first 8 volumes of the *Bensheimer* Collection (*Bensheimer Sammlung*) of the decisions of the *RAG* and the regional labour tribunals (*Landesarbeitsgerichte*), as well as the decisions of the Supreme *Reich* Court (*Reichsgericht – RG*), which were partly taken before and partly also after the Law of Labour Tribunals (*AGG*) came into operation. The *Bensheimer Sammlung* will henceforth be referred to as *Bensh. Samml.*, Vol. 1, No. 2, p. 3 etc.
5. Translated in *Die Arbeit*, 1927 278ff. Cf. on this following section: Heller, *Europa und der Faschismus*, particularly pp. 107ff.; von Beckerath, *Wesen und Werden des faschistischen Staates*, particularly pp. 96ff.; idem, *Idee und Wirklichkeit im Faschismus, Schmollers Jahrbuch*, 52 (1928) 201ff, particularly 208/209.
6. See Ernst Fraenkel, '10 Jahre Betriebsrätegesetz', *Gesellschaft*, 1930 117, particularly 120 [reprinted in Ramm (1966), see p. 97 and p. 100].
7. *Bensh. Samml.*, Vol. 6, No. 82, p. 335; cf. also *RAG* decision of 16 November 1929, *Bensh. Samml.*, Vol. 7, No. 107, p. 476.
8. *Bensh. Samml.*, Vol. 6, No. 77, p. 320; cf. also *RAG* decision of 26 March 1930, *Bensh. Samml.*, Vol. 9, No. 10, p. 41. In this latter case, part of the workforce had taken time off to participate in the May Day celebrations, and the employer had singled out the members of the works council and summarily dismissed them. The *RAG* confirmed these dismissals: 'As members of the works council the appellants were obliged, under the Law of Works Councils (*BRG* s. 66(3) and (6)), to ensure that a large number of workers should not decide to take time off on the 1st May against the wishes of the employer'.
9. *Bensh. Samml.*, Vol. 7, No. 99, p. 444.
10. We shall come back to this decision later in another context.
11. Decision of the *RAG* of 26 February 1930, *Bensh. Samml.*, Vol. 8, No. 106, pp. 519ff. See also the decision of 26 March 1930, *Bensh. Samml.*, Vol. 9, No. 14, p. 52, in which the *RAG* places a special obligation on works councillors to keep the peace and to keep good faith. In other respects, this decision, and that of 16 April 1930 (*Bensh. Samml.*, Vol. 9, No. 12, p. 46), is a welcome example of the fact that, despite the limitations it imposes on the works councillor as such, the *RAG* does not fundamentally interfere with his freedom to engage in other areas of trade union activity apart from industrial action.
12. Cf. on this issue the earlier decision of the *RAG* of 17 November 1927, *Bensh. Samml.*, Vol. 1, No. 11, p. 29, in which the *RAG* went very much further in stressing the obligation of the employer to provide information on the hours of work of lower grades of salaried employees.
13. *Bensh. Samml.*, Vol. 2, No. 23, p. 71 and 75 and in many other decisions.
14. Cf. Carl Schmitt, *Verfassungslehre* (1928), p. 56, p. 213.
15. Throughout this monograph, the employer is assumed in the interests of simplicity to be co-terminous with the works manager and the owner of the

means of production. In reality, there can be a divorce between economic and legal ownership, and there frequently is a divorce between the position of the employer and that of the entrepreneur or manager. However, this divorce plays no role in the framework of our examination, since, from the standpoint of the employee, entrepreneur and employer, economic and legal ownership of the means of production, constitute a unity in their function as social adversary.

16. *Reich* Court of 30 October 1929, *Bensh. Samml.*, Vol. 7, p. 565.
17. *Bensh. Samml.*, Vol. 9, No. 58, p. 254.
18. Cf. the initial decisions of the *Reich* Court, *RGZ* 86 152; 113 197; 111 105; 118 196, later followed by the *RAG*.
19. *RGZ* 107 144; 111 354; *Reich* Court of 29 October 1926, in: Dersch, Flatow, Hueck and Nipperdey, *Rechtsprechung des RG zum Arbeitsrecht*, Vol. 2, p. 4; *RG* of 6 July 1927, ibid, Vol. 2, p. 9; *RG* of 18 November 1927, ibid, Vol. 2, p. 11.
20. *Bensh. Samml.*, Vol. 5, No. 134, p. 537 and No. 135, p. 543.
21. *Bensh. Samml.*, Vol. 8, p. 544 (Third Civil Division).
22. *Bensh. Samml.*, Vol. 5, No. 53, p. 199; Vol. 8, No. 46, p. 227.
23. Decision of 10 January 1925 and 19 October 1926, in: Dersch, Flatow, Hueck and Nipperdey, op.cit., Vol. 2, pp. 220 & 222.
24. Cf. *RAG* of 6 March 1929, *Bensh. Samml.*, Vol. 5, No. 84, p. 340; of 26 March 1930, *Bensh. Samml.*, Vol. 9, No. 10, p. 41.
25. *RAG* of 5 February 1930, *Bensh. Samml.*, Vol. 8, No. 53, p. 266.
26. *RG* of 17 September & 22 November 1928, in: Dersch, Flatow, Hueck and Nipperdey, op.cit., Vol. 2, p. 136 & 244, also *RAG* of 21 December 1927, *Bensh. Samml.*, Vol. 1, No. 29, p. 100.
27. *RAG* of 21 March 1928, *Bensh. Samml.*, Vol. 2, No. 64, p. 217.
28. *RG* of 30 October 1929, *Bensh. Samml.*, Vol. 7, p. 565; *RAG* of 16 November 1929, *Bensh. Samml.*, Vol. 7, No. 107, p. 476.
29. *RGZ* 111 105.
30. *RG* of 2 July 1925, *RGZ* 111 199.
31. *RG* of 11 February 1925, *RGZ* 113 133.
32. *RG* of 8 November 1922, in: Dersch, Flatow, Hueck and Nipperdey, op.cit., Vol. 2, p. 108; *RAG* of 24 April 1929, *Bensh. Samml.*, Vol. 6, No. 107, p. 427; *RAG* of 23 January 1929, *Bensh. Samml.*, Vol. 5, No. 65, p. 253; *RAG* of 6 November 1929, *Bensh. Samml.*, Vol. 7, No. 92, p. 405.
33. *Bensh. Samml.*, Vol. 4, No. 63, p. 239; Vol. 4, No. 78, p. 294; Vol. 5, No. 57, p. 217.

33a. *RAG* of 21 May 1930, *Bensh. Samml.*, Vol. 9, No. 107, p. 487. [The footnote numbering of the original is retained.]

34. *RGZ* 107 247.
35. Gerber, *Gutachten über die Frage der gewollten Tarifunfähigkeit von Arbeitgeberorganisationen* (1925); see on this matter: Kandeler, *Die Stellung der Berufsverbände im öffentlichen Recht* (1927).
36. Cf. on this matter the extremely interesting quotation of Corradini: *'Il regime della borghesia produttiva'*, in Heller, *Europa und der Faschismus*, p. 107.
37. *RGZ* 106 272.

38. Cf. *RAG* of 1 February, 7 March and 30 April 1928, *Bensh. Samml.*, Vol. 2, No. 22, p. 68; No. 46, p. 135; Nr. 65, p. 229.
39. *Bensh. Samml.*, Vol. 3, No. 35, p. 116.
40. *RAG* of 4 July 1928, *Bensh. Samml.*, Vol. 3, No. 37, p. 129; of 4 July 1928, ibid., Vol. 3, No. 53, p. 178; of 3 November 1928, ibid., Vol. 4, No. 43, p. 149; of 22 December 1928, ibid., Vol. 5, No. 11, p. 32; of 15 December 1928, ibid., Vol. 5, No. 13, p. 38; of 15 December 1928, ibid., Vol. 5, No. 14, p. 41; of 9 January 1929, ibid., Vol. 5, No. 12, p. 34; of 16 January, Vol. 5, No. 31, p. 110; of 2 March 1929, ibid., Vol. 5, No. 93, p. 166; of 11 May 1929, ibid., Vol. 6, No. 1, p. 1; of 12 October 1929, ibid., Vol. 7, No. 32, p. 132; of 2 November 1929, ibid., Vol. 7, No. 68, p. 305; of 23 November 1929, ibid., Vol. 7, No. 106, p. 467; of 30 November 1929, ibid., Vol. 7, No. 94, p. 415; of 8 February 1930, ibid., Vol. 8, No. 83, p. 407; of 15 February 1930, ibid., Vol. 8, No. 52, p. 260; of 22 February 1930, ibid., Vol. 8, No. 84, p. 413. See also *RAG* of 2 July 1930, *Bensh. Samml.*, Vol. 9, No. 120, p. 537. In this last decision, the doctrine of works risk is also applied to apprentices, even though they have no right to participate in works council elections; the legal basis of their 'works bond' is thus a complete mystery.
41. Decision of 4 January 1928, *Bensh. Samml.*, Vol. 2, No. 1, p. 1.
42. *Bensh. Samml.*, Vol. 2, No. 3, p. 12; Vol. 2, No. 4, p. 15; Vol. 2, No. 27, p. 85; Vol. 3, No. 12, p. 37; Vol. 3, No. 36, p. 125; Vol. 4, No. 32, p. 108; Vol. 4, No. 34, p. 118; Vol. 4, No. 97, p. 376; Vol. 4, No. 96, p. 375; Vol. 4, No. 98, p. 379; Vol. 5, No. 115, p. 456; Vol. 6, No. 23, p. 75; Vol. 6, No. 32, p. 130; Vol. 6, No. 117, p. 471; Vol. 6, No. 114, p. 455; Vol. 7, No. 51, p. 219; Vol. 7, No. 105, p. 464; Vol. 8, No. 47, p. 235; Vol. 8, No. 92, p. 451; Vol. 8, No. 103, p. 498; Vol. 8, No. 96, p. 468.

42a. The phenomenon of a court (which has to make decisions on major conflicts of collective interests and is composed of representatives of both sides and a 'neutral third party') favouring the more powerful group in matters of fundamental legal principle but inclining towards the less powerful party in the application of principles to individual cases, is not confined to labour law. It arises in a similar fashion in international law, e.g. in the 'Mixed Arbitration Courts' established under the Versailles Treaty. Cf. van Hagens, JW. 1930 131, who also gives the psychological reasons for this phenomenon. Most noteworthy, also for labour law, is his discussion of the 'comparative' character of the reasoning behind such decisions.

43. Kaskel, *Arbeitsrecht*, 3rd edition, p. 114, p. 217.
44. *RAG* of 10 October 1928, *Bensh. Samml.*, Vol. 4, No. 37, p. 131.
45. *Bensh. Samml.*, Vol. 4, No. 99, p. 381.
46. *Bensh. Samml.*, Vol. 6, No. 63, p. 253.
47. The author knows from a private source that, in the case mentioned above, the employer only ordered overtime working for publicity reasons in order to give the impression to the outside world that the plant was prospering. In reality, the overtime was not necessary at all, and the firm went bankrupt a short time later; the employer was convicted of fraudulent bankruptcy and punished.

48. Thus, for example, *RAG* of 16 October 1929, *Bensh. Samml.*, Vol. 7, No. 57, p. 253; *RAG* of 16 November 1929, *Bensh. Samml.*, Vol. 7, No. 107, p. 476, especially p. 481 (in this case, the idea of works discipline was directly linked with that of the works bond); *RAG* of 30 November 1929, *Bensh. Samml.*, Vol. 8, No. 16, p. 63 (in this case the *Reich* Railway Company was even given the right to transfer a worker to another job with a reduction in wages); and finally *RAG* of 14 December 1929, *Bensh. Samml.*, Vol. 8, No. 58, p. 290; *RAG* of 1 March 1930, *Bensh. Samml.*, Vol. 8, No. 104, p. 504.
49. Decision of 3 November 1928, *Bensh. Samml.*, Vol. 4, No. 74, p. 278.
50. *Bensh. Samml.*, Vol. 1, No. 17, p. 54.
51. *Bensh. Samml.*, Vol. 4, No. 99, p. 381; Vol. 6, No. 32, p. 335; Vol. 6, No. 63, p. 253.
52. *Bensh. Samml.*, Vol. 5, No. 20, p. 62; similarly also *RAG* of 16 October 1929, *Bensh. Samml.*, Vol. 9, No. 39, p. 186; *RAG* of 7 May 1930, *Bensh. Samml.*, Vol. 9, No. 78, p. 342; *RAG* of 7 May 1930, *Bensh. Samml.*, Vol. 9, No. 91, p. 393.
53. This is clearly evident in a decision of 26 March 1930, *Bensh. Samml.*, Vol. 9, No. 10, p. 42, relating to the celebration of the 1st May: 'When the appellants stayed away from work, the respondent not only suffered an injury to his material interest in the factory, but more importantly, his right to manage was disregarded and disparaged'.
54. In two decisions the *RAG* has refused to accept the relevance of the idea of works discipline and has not confirmed a 'persistent refusal to work'. *RAG* of 6 July 1929, *Bensh. Samml.*, Vol. 6, No. 93, p. 277; *RAG* of 15 December 1928, *Bensh. Samml.*, Vol. 5, No. 19, p. 55.
55. *RAG* of 21 December 1929, *Bensh. Samml.*, Vol. 7, No. 99, p. 444.
56. *RAG* of 19 February 1930, *Bensh. Samml.*, Vol. 8, No. 40, p. 204.
57. *RAG* of 26 October 1927, *Bensh. Samml.*, Vol. 1, No. 7, p. 14; *RAG* of 8 February 1928, *Bensh. Samml.*, Vol. 2, No. 23, p. 71; *RAG* of 16 January 1929, *Bensh. Samml.*, Vol. 5, No. 32, p. 113; *RAG* of 13 March 1929, *Bensh. Samml.*, Vol. 5, No. 86, p. 377; *RAG* of 23 October 1929, *Bensh. Samml.*, Vol. 7, No. 73, p. 323; *RAG* of 30 November 1929, *Bensh. Samml.*, Vol. 7, No. 90, p. 397.
58. *Bensh. Samml.*, Vol. 5, No. 80, p. 326.
59. *Bensh. Samml.*, Vol. 4, No. 49, p. 170; *Bensh. Samml.*, Vol. 8, No. 71, p. 352.
60. Cf. the outline of this ideological development in Heller, op.cit., pp. 109–10.
61. Cf. Beckrath, *Wesen und Werden des Faschismus* (1927), p. 130.
62. Cf. ibid., p. 51.
63. Cf. on this matter Franz Neumann, *Die politische und soziale Bedeutung der arbeitsgerichtlichen Rechtsprechung* (1929), pp. 27ff. [Reprinted in T. Ramm (1966), pp. 134ff.]
64. Cf. in particular the decision of 15 February 1930, *Bensh. Samml.*, Vol. 8, No. 92, p. 451, and also the following decisions: of 21 March 1928, *Bensh. Samml.*, Vol. 2, No. 66, p. 232; of 10 August 1928, *Bensh. Samml.*, Vol. 3, No. 63, p. 207; of 14 March, *Bensh. Samml.*, Vol. 2, No. 44, p. 145; of 5 December 1928, *Bensh. Samml.*, Vol. 4, No. 67, p. 255; of 23 February

1929, *Bensh. Samml.*, Vol. 5, No. 92, p. 364; of 23 February, *Bensh. Samml.*, Vol. 5, No. 123, p. 486; of 5 January 1929, *Bensh. Samml.*, Vol. 5, No. 9, p. 27; of 4 December 1929, *Bensh. Samml.*, Vol. 9, No. 102, p. 451.

65. Cf. reference 57 above.
66. *RAG* of 17 November, *Bensh. Samml.*, Vol. 1, No. 12, p. 35; of 21 December 1927, *Bensh. Samml.*, Vol. 1, No. 33, p. 118; of 10 April 1929, *Bensh. Samml.*, Vol. 5, No. 130, p. 250.
67. *Bensh. Samml.*, Vol. 1, No. 30, p. 103; cf. also the decision of 22 February 1928, *Bensh. Samml.*, Vol. 2, No. 7, p. 27.
68. *Bensh. Samml.*, Vol. 3, No. 6, p. 16; *Bensh. Samml.*, Vol. 5, No. 7, p. 19; *Bensh. Samml.*, Vol. 6, No. 70, p. 290.
69. *RAG* of 18 January 1928, *Bensh. Samml.*, Vol. 2, No. 16, p. 56; of 16 March 1929, *Bensh. Samml.*, Vol. 5, No. 119, p. 470; of 22 August 1929, *Bensh. Samml.*, Vol. 6, No. 151, p. 618; of 26 June 1929, *Bensh. Samml.*, Vol. 6, No. 133, p. 545.
70. *RAG* of 22 August 1929, *Bensh. Samml.*, Vol. 6, No. 151, p. 618; of 15 February 1930, *Bensh. Samml.*, Vol. 8, No. 55, p. 277.
71. E.g. *RAG* of 13 July 1929, *Bensh. Samml.*, Vol. 6, No. 135, p. 561.
72. *RAG* of 6 & 15 February 1928, *Bensh. Samml.*, Vol. 2, Nos. 38/39, p. 122/128.
73. *RAG* of 13 February 1929, *Bensh. Samml.*, Vol. 5, No. 56, p. 214; of 28 September 1929, *Bensh. Samml.*, Vol. 7, No. 20, p. 93; of 25 September 1929, *Bensh. Samml.*, Vol. 7, No. 44, p. 184; of 28 September 1929, *Bensh. Samml.*, Vol. 7, No. 21, p. 95; of 12 October 1929, *Bensh. Samml.*, Vol. 7, No. 33, p. 142; of 19 October 1929, *Bensh. Samml.*, Vol. 7, No. 43, p. 181; of 11 January 1930, *Bensh. Samml.*, Vol. 8, No. 19, p. 79.
74. Cf. e.g. *RAG* of 12 January 1929, *Bensh. Samml.*, Vol. 5, No. 15, p. 43; of 12 January 1929, *Bensh. Samml.*, Vol. 5, No. 16, p. 44; of 23 March 1929, *Bensh. Samml.*, Vol. 5, No. 98, p. 382; of 13 March 1929, *Bensh. Samml.*, Vol. 5, No. 131, p. 523.
75. Cf. the continued emphasis on the recuperative purpose in the decisions of 19 February 1930, *Bensh. Samml.*, Vol. 8, No. 80, p. 391; of 21 September 1929, *Bensh. Samml.*, Vol. 7, No. 8, p. 32; of 22 February 1930, *Bensh. Samml.*, Vol. 8, No. 90, p. 433; of 19 March 1930, *Bensh. Samml.*, Vol. 9, No. 4, p. 14; of 19 March 1930, Vol. 9, No. 9, p. 38.
76. *RAG* of 19 June 1929, *Bensh. Samml.*, Vol. 6, No. 90, p. 368.
77. *RAG* of 20 June 1928, *Bensh. Samml.*, Vol. 3, No. 20, p. 65.
78. *RAG* of 2 March 1929 and 1 June 1929, *Bensh. Samml.*, Vol. 5, No. 83, p. 336 & Vol. 6, No. 34, p. 139.
79. *RAG* of 13 March 1929, *Bensh. Samml.*, Vol. 6, No. 23, p. 75; of 19 March 1930, *Bensh. Samml.*, Vol. 9, No. 3, p. 11.
80. *RAG* of 11 January 1930, *Bensh. Samml.*, Vol. 8, No. 56, p. 280.
81. *RAG* of 22 January 1929, *Bensh. Samml.*, Vol. 5, No. 50, p. 167ff.
82. *RAG* of 27 June 1928, *Bensh. Samml.*, Vol. 3, No. 42, p. 147 and of 2 February 1929, *Bensh. Samml.*, Vol. 5, No. 104, p. 411.
83. Karl Mannheim, *Ideologie und Utopie*, pp. 77ff.

84. *Der korporative Arbeitsnormenvertrag* (1907/1908); *Ein Arbeitstarifgesetz* (1916).
85. Emil Lederer, 'Die Umschichtung des Proletariats', *Neue Rundschau*, 1929; *Die Angestellten in der Wirtschaft*, edited by the *AfA-Bund* (1928); on the ideological side of the question: Croner, 'Die Angestelltenbewegung nach der Währungsstabilisierung', *Archiv für Sozialwissenschaft*, Vol. 60, p. 105ff; Kracauer, *Die Angestellten* (1930), and the interesting polemic arising out of this publication: Jahn, 'Das Sozialbewusstsein der Angestellten'. *Der Kaufmann in Wirtschaft under Recht*, 1930, p. 241, and Croner, 'Das Sozialbewusstsein des DHV.', *AfA-Bundeszeitung*, 1930, p. 117.

4

The Changing Function of Labour Law

Introduction

The task of the sociology of law may be described as the portrayal of the relation between legal norms and social reality.[1] On the one hand it must examine the effect of the law on society, the 'social function' of legal institutions. On the other hand, it must investigate how the external social world, how economic, social and political events influence the sum total of legal norms. In terms of the sociology of law, a legal norm must be understood not merely as the content of written law (*Gesetz*). The concept of legal norm comprises in fact all the rules of behaviour to which the members of society submit themselves out of a belief in their normative force as law, irrespective of whether these rules are based on written law, on the exercise of judicial or administrative authority or even on 'customs' which have crystallised over time into obligatory commands. The fact that, at any given time, the sum total of norms of a legal system is not identical with the sum total of its written regulations is based on the phenomenon that the law (*Recht*) can change over time while the content of its statutes remains unaltered. The appearance and disappearance of legal norms is a continuous process which takes place through and outside the corpus of written law. Society is working ceaselessly on the sum total of legal norms. It creates new norms, for example through contractual practice. It causes existing norms to disappear by refusing to apply them. It alters the content of existing legal rules through changes in 'interpretation'. The statement that the law is a product of the social relations of power must not only be understood in political terms. Social forces not only shape the law through political institutions, but also by their influence on judicial,

administrative and contractual practice, and by their involvement in conflict and the resolution of conflict.

In this essay an attempt is made to show how the sum total of norms of German labour law has changed in the period from the outbreak of the revolution in 1918 until the end of 1931 with the proclamation by the *Reich* President of the 4th Emergency Decree to Safeguard Economic and Financial Stability, and to uncover the general line of development indicated by this change. By investigating the way in which the norms have changed, particularly the change in their application, it can be shown that in this period the social function of labour law as a whole has undergone a gradual transformation. There is an inextricable link between the examination of changing norms and the examination of changing functions.[2] Here, we shall only be examining specific regulations and events inasmuch as they serve to illustrate and exemplify the general line of development under analysis.

Employment Legislation in Germany before 1918

The development of pre-revolutionary labour law was decisively influenced by two different systems of ideas: (a) the socio-political ideology of the industrial bourgeoisie, that is, the theory of the formal equality and freedom of persons under the law and the theory of the free contract of employment as the foundation of working life; and (b) social conservatism, reflected in the German Law tradition of the contract of employment as a legally regulated bond of fidelity between persons. The socio-political antagonism between the liberal and social-conservative schools found expression in the legal sphere in the dispute between 'Romanist' and 'Germanist' jurists, and, in the special discipline of 'social' law, in the conflict between the conception of the contract of employment as an exchange relation embodied in mutual obligations (*schuldrechtlich*) and its conceptualisation as a personal relation of obedience and protection (*personenrechtlich*).

It is true that section 105 of the Industrial Code (*GewO*) of 1869 proclaimed the 'freely agreed contract' as the basis of the employment relationship, and that the Civil Code (*BGB*) laid down no specific rules on the contract of employment, treating it together with the freely agreed contract of service (which was not tied to a particular 'works' (*Betrieb*)) as a particular, homogeneous type of synallagmatic contract. However, by upholding in principle the fiction of the free contract of employment, the government found itself compelled to introduce special regulations in recognition of the social dependency inherent in

the employment relationship. This regard for the unique socio-political fact of the dependency of the employee was decisively promoted by the propagation of the German Law idea of the mutual obligations of master and servant, that is, the servant's obligation to perform personal services and submit to the orders of his 'master', and the master's obligation to protect the servant and safeguard his welfare. The German school and particularly Otto von Gierke successfully counterposed this idea to the Romanist conceptual system of *do ut facias*.

The penetration of the liberal-individualist legal system by institutions of a social-conservative stamp was made possible politically by the unique character of power relations in Germany. Through the co-operation between the conservative civil service and the landowning classes, who had a decisive share in the exercise of political power, it was possible to realise aims which did not correspond to the wishes and supposed interests of the large industrial capitalists. For the large landowners, who exerted a decisive influence on national legislation through the notorious inbuilt bias of the voting system in the 2nd Chamber of the National Parliament and by uniting in one person the positions of Chancellor of the *Reich* and Minister President of Prussia, were prepared to impose on industry social restrictions which they themselves resisted in their own sphere. Thus it is significant that by far the largest part of the regulations with a conservative-welfare flavour (the anti-truck statute, the maximum working day for women and juveniles, the prohibition of child labour and Sunday working etc.) was to be found in the continually changing Industrial Code (*GewO*), which applied neither to agricultural undertakings nor to the majority of public enterprises, including notably the railways. The much deplored 'fragmentation of labour law' is to a large extent an expression of the uneven distribution of political power between different sectors of the economy. After all, it should be remembered that the social-welfare tendency managed to exert an influence on areas apart from the Industrial Code, for instance on the drafting of the Civil Code (*BGB*); it also helped to breach, to a limited extent, the fiction of equality in the employment relationship.[3] Taken together with the social insurance system, the statutory right of employees to protection contained in a series of public-law and private-law provisions signified an important inroad of conservative ideas into liberal legal ideology.

However, it was and remained characteristic of pre-1914 social law and its ideological origins, even of those areas in which conservative German Law ideas predominated, that the employee was never defined or considered other than as an individual object of welfare and protection, either of the state or of the employer. In complete contradiction

to social reality legislation regarded the employee, inasmuch as he figured as the active creator of his own rights and obligations, simply as an isolated individual, as a party to the 'free contract of employment'. While the Roman school of legal thinking (the contractual approach) defined the employee simply as an isolated subject, the German school (the obedience and protection approach) defined him simply as an isolated object. The conscious aim of social-conservative initiatives was to prevent the active collective intervention of the workers as a class.

The particular methods used by the legislature in its attempt to counter the formation of the collective will [of the working class] are once again characteristic of the distribution of political power mentioned above. The state allowed manual workers in industry and handicrafts (*gewerbliche Arbeiter*) to form trade unions (*GewO* s. 152(1)), but it refused to allow the unions to deploy their resources of power in order to exercise their rights (*GewO* s. 152(2)) and imposed special legal restrictions on their activities (*GewO* s. 153). Moreover, the law of the *Reich* refused to give agricultural workers and state employees (including railway employees and even those who were not civil servants (*Beamte*) according to public law) any protection against regional state (*Länder*) anti-combination laws, such as existed especially for agriculture in the Domestic and Agricultural Service Codes (*GesO*). The law of the *Reich* also failed to grant salaried employees (*Angestellte*) in whatever sector of the economy any positive dispensation to form trade unions; the freedom to form trade unions was only granted to 'manual workers, journeymen or labourers' (*GewO* s. 152(1)) and not to technical staffs, who were nevertheless also subject to the Industrial Code (*GewO* s. 133ff.).

This division between manual workers (*Arbeiter*) and salaried employees (*Angestellte*), which permeates almost every branch of social legislation, is a further characteristic of pre-war social law with extremely important consequences. The private-law employment relations of clerical employees were and are regulated in the Commercial Code (*Handelsgesetzbuch*). Technical staffs are, as mentioned above, subject to special regulations (contained in the Industrial Code (*GewO*)) which are broadly similar to the provisions covering clerical employees.[4] However, the creation of a special insurance scheme for salaried employees in 1913 was far more important in sustaining the dividing line between workers and salaried employees than their different treatment under trade union and contract of employment law. At the very moment when economic and social developments were threatening to generate both a mass and a class consciousness among white-collar workers, very special care was taken with the consent of the bourgeois white-collar

organisations to preserve, through the introduction of the insurance scheme for salaried employees, a specific white-collar ideology, to maintain a feeling among white-collar workers of being privileged in relation to manual workers. Perhaps there is no other example which demonstrates so conclusively the social function of legal institutions, their tendency consciously to create and change ideologies. The nature of the ideologies desired by the ruling powers is shown clearly by the special legal norms established to cover the contract of employment of salaried employees; continued payment of salary in case of illness, and long, excessively long notice of dismissal, embodied the principle that the salaried employee – like the public servant (*Beamte*) – does not receive payment for his work, but a kind of claim to a livelihood in return for subordinating his labour power. In this way the salaried employee, in clear contrast to his manual counterpart, is encouraged to feel a bond with the establishment (*Betrieb*) in which he works. This incorporation of status privileges into pre-war legislation, and the conformity of this legislation with the ideology of certain sections of the capitalist intermediate strata, was a particularly important starting point for later developments.

The overall picture of pre-war legislation was thus a mixture of liberal-individualist and conservative-welfare legal ideas. It was characterised by three main features: (i) the rejection, indeed the legal denial of the existence of organisations oriented towards class struggle as the bearers of the further development of the law; (ii) the definition of the employee in purely individual terms, as a party to a contract or as a member of the community in need of protection; and (iii) the recognition of different occupational status groups (though not of proletarian class organisation) within the working class as a matter for legal regulation.

However, the legal position of German employees at the outbreak of the First World War was by no means exclusively or even predominantly determined by legislation. A rising class regularly uses social, extra-political methods to create for itself a series of legal norms which supplement and often override state legislation. In this way large sections of the German working class, particularly those employed in the area bordered on one side by the small handicraft sector and on the other by manufacturing industry, were successful in creating a corpus of norms in the form of collective agreements. Admittedly they were without statutory force, but the trade unions were generally able to guarantee their observance through the social methods of external organisational pressure. These extra-statutory norms were often more important than legislation in establishing the rights and obligations arising out of the employment relationship. The state played virtually

no role in securing their acceptance. There was no legal obstacle to contracting out of the collectively agreed norms through the individual contract of employment, and the only guarantee that the provisions of collective agreements would be observed lay in the possibility of 'social enforcement'[5] (*soziale Exekution*), that is, in the organisational strength and the degree of militancy of the working class. Because of its importance for later developments it should be particularly emphasised that the number of salaried employees covered by collective agreements in the pre-war period was both small and getting smaller.[6] In other words, when the idea of collective bargaining achieved wider acceptance among salaried employees in the period after 1918, the state had already established itself alongside the autonomous organisations as the guarantor of collectively agreed terms and conditions of employment.

The first sign of a change in the attitude of the legislature towards the formation of social classes and collective organisations emerged during the war in the provisions of the Auxiliary Service Law (*Hilfsdienstgesetz*). The strong demand for labour and the need to maintain the support of the workers' party [the SPD] had strengthened the social and political position of the working classes to such an extent that it was no longer possible to maintain the principles on which all previous legislation had been based. By giving trade unions rights of representation on the newly created arbitration authorities, a first step was taken towards the legal recognition of the organisations which until them had led an 'extra-legal' existence.

The Establishment of a Collectivist System of Labour Law in the Weimar Republic

The political and social situation in 1919 (as expressed in the relative strength of the political parties in the National Assembly) led to a temporary state of equilibrium in the balance of power between the bourgeoisie and the working class. This state of equilibrium was reflected both in the creation of new labour law norms and in their underlying ideology. The decisive change was the recognition of organisations of employers and employees as law-creating institutions. This recognition was contained in Article 165 of the Reich Constitution (*RV*), but it was also embodied in the automatic compulsory normative effect of collective agreements, which was established by the Collective Agreements Decree (*TVV*) of 23 December 1918 and opened up the possibility of the social generation of legal norms by means of industrial conflict. The Law of Works Councils (*BRG*) of 4 February 1920, which

established the overall priority of trade union policy and organisation over the decisions and activities of the works councils (*BRG* s. 8 *et passim*), secured for the unions a legally guaranteed influence on matters arising inside the plant. This influence was strengthened particularly by the special protection against dismissal accorded to members of the works council (*BRG* s. 96), that is, usually trade union workplace representatives (*gewerkschaftliche Vertrauensleute*). The liberal fiction of the equality of the parties to the contract of employment was reduced in significance. The conservative welfare idea of the protection of the individual employee was also forced into the background. Collectivism became the dominant ideology. It substituted for the parity of individuals the parity of collectives.

The characteristic feature of the collectivist ideology of law is that it transfers the main emphasis in social policy from the political to the social sphere. The rights and obligations of employees are no longer to be determined primarily by their relative share of political power or by the extent to which the state takes account of the interests of employees, but by their social, that is their organisational strength. The state recognises as law (*Recht*) the result of the social conflicts between collectively organised employees and collectively organised employers, and makes available all its resources of power in order to enforce the law thus created. The situation of employees is no longer conceived as a static condition, but as a dynamic process. The state relinquishes any claim to determine the legal situation as it affects social policy; on the contrary, it gives full scope to the social development of the law and endorses its outcome at any given time. Every stage of social policy thus appears as a transition stage. Only a dialectical conception of social events, only an ideology for which everything social is dynamic and not static, could produce such a system of law. However, for virtually all those involved, employees and employers alike, the term 'transition stage' inevitably refers not only to each individual phase of collectivist development, but also to the collectivist system as a whole. This is because, for the large majority of working people, collectivism as an element of the capitalist economic order is nothing final, but simply one of the roads to the total seizure of power. For the employers, on the other hand, collectivism meant and means a position of retreat, from where consciously or unconsciously they are considering a renewed offensive and a return to a liberal-conservative system of social policy.

A peculiar reciprocal movement of effect and counter-effect in the relations between the state and the organisations resulted from this system of ideas. A legal system, which aspired to embrace the conflicting forces of industrial life not as individuals but as social groups, as classes,

could not stop at the dispensation to form organisations, nor at the constitutional guarantee of freedom of association (*RV* Art, 159), nor at the 'recognition' of the associations (*RV* Art. 165). If it was to build the conflict between the organisations into the legal system as a law-creating factor, it was duty bound to promote actively the idea of collective social organisation. It had to seek through legislation to assist the organisations both in their formation and growth and in their activity. However, should the state not wish to abandon entirely its own social policy-making role – and this it could not do – it would have to ensure that there was a certain measure of co-ordination between its social policy and that of the organisations. On the other hand, the positive relationship between the state and the organisations could not be allowed to go so far that the organisations lost their fundamental character as freely constituted collective groups. For this reason, both the introduction of compulsory membership of trade unions and employers' associations and also the institutionalisation of state influence on the internal decision-making of the associations were rejected. What remained as a means of creating some degree of co-ordination between the social policy of the state and that of the associations was to concede to the organisations a certain degree of influence on the formation of state policy (*Staatswille*). The problem was the following: how to make the voluntary associations the active bearers of the further development of social policy, to give limited state encouragement to them for this purpose and to allow them to participate in the formation of state policy, without robbing them of their essential character as free and representative class organisations (existing outside the state) and without imposing a political programme on them. For there was no question that the associations would have to continue to exist outside the state under private law, even if the state was to assist and encourage them and their goals, and even if the social effect of their activities extended into the state's sphere of activity.

Once again, the German Law tradition exerted a strong influence on the legal form in which this peculiar relationship between the freely constituted occupational associations and the state was expressed. The old *Ständestaat* concept of autonomy, that is, corporate self-government within a larger community, was applied to the collective creation of social policy norms by the associations. However, this concept of autonomy was redefined so that it was not *one* social group but two organised communities with conflicting objectives on whom self-government was conferred.[7] The state was committed to assist with all the means at its disposal in giving effect to the outcome of these conflicting objectives, that is the relative strength of class forces at any given time.

Under the collectivist system of law we can thus distinguish between those measures by which the state places its resources of power in the service of the organisational ideal, and such legal provisions by which (conversely) the state uses the organisations for its own ends. The relationship of mutual support and mutual service is a relationship of reciprocity in the sense that each measure which is destined to support the organisations also realises the goals of the state; conversely, every time the organisations are called upon to realise the goals of the state it is equally to the advantage of the associations.

Included in the first group of measures are the introduction of the automatic compulsory normative effect of collective agreements (already mentioned above), which makes it legally impossible for an organised employer and an organised employee to deviate by individual arrangement from the relevant collective agreement to the detriment of the employee. Henceforth, social sanctions were complemented by state sanctions in the enforcement of collectively agreed conditions of employment, the picket by the bailiff as the guarantor of the collectively agreed wage rate (*TVO* cl. 1). If the automatic compulsory effect functioned as a form of state support for the associations, then the introduction of the principle of 'extension' of collective agreements (*Allgemeinverbindlichkeitserklärung von Tarifverträgen*) removed an obstacle to the growth of both trade unions and employers' associations. The statutory authority vested in the *Reich* Minister of Labour to apply the principle of 'extension', that is, to extend the social effect of collective agreements to unorganised employers and employees (*TVO* cl. 2), acted as a counterbalance to the possibility that organised workers might be disadvantaged in the labour market through being undercut and displaced by unorganised workers. Another measure which gave support to the organisations was the introduction of the system of works councils, notably through the influence of the trade unions (as envisaged under the law) on the activity of all representative bodies at plant level. In this context we should mention the provisions of the Decree on Working Time (*AZVO* cl. 5), which permit a breach in the statutory eight-hour-day normally only by collective agreement; in this case, state legislation is used to interest the employers in the conclusion of collective agreements. Among the measures promoting collective organisation we can also count the exclusion of advocates and all other professional representatives, with the exception of those authorised by the organisations, from appearing in the industrial and commercial tribunals (*Gewerbe– und Kaufmannsgerichte*) and later in the labour tribunals (*Arbeitsgerichte*). These measures (Amendment to the Law of Industrial and Commercial Tribunals (*GKGG*) of 14 January 1922, later

section 11 of the Law of Labour Tribunals (*AGG*) of 23 December 1926) accorded a privileged position to the organised individual in the legal defence of his rights, and granted the employers' associations and the trade unions the exclusive right to represent their members before the tribunals, thereby creating a very effective and important instrument of collective representation, particularly during the crisis [that is, after 1929]. Among the measures which exemplify the support given by the state to the organisations, we would mention in conclusion the provisions of the Employment Service and Unemployment Insurance Law (*AVAVG*) of 16 July 1927, which prohibits local employment offices from offering jobs at below the collectively agreed rates (*AVAVG* s. 62) and from offering the jobs of workers on strike without expressly informing the person seeking work that it is 'strike work' (*AVAVG* s. 63). This represents a renewed endorsement of industrial conflict as a legal institution and an extension of the social effect of collective agreements to a point where they begin to function as institutions of public law.

The arrangements through which (conversely) the organisations were placed in the service of the state consisted essentially in their involvement in the formation of public bodies. They became involved in the legislative process through the Decree of 4 May 1920 establishing the Provisional *Reich* Economic Council, and in the administration of justice by their right to nominate lay members to labour tribunals at all three levels (in contrast to the previous system where the lay members of industrial and commercial tribunals were selected by the employers and employees directly involved). In the same field we can cite the transfer to the collective organisations of the exclusive right to nominate candidates for election to the controlling bodies of the social insurance system, as well as for the election of lay members to the social insurance authorities (Law of 8 April 1927, see also in particular clause 15 of the *Reich* Insurance Order (*Reichsversicherungsordnung*)) and the analogous right of nomination to public bodies established under the Employment Service and Unemployment Insurance Law (*AVAVG* s. 6). A similar right of nomination exists in the appointment of lay members to sit on arbitration committees (*SchlVO* Cl. 1(3), also clause 4 of the second Code of Practice on the implementation of the Arbitration Decree).

The state makes use of the organisations not only in the establishment of public bodies, but also in the execution of its own social policy, that is, by making the associations responsible for the implementation of compulsorily imposed wage awards (*Zwangstarife*). This will be dealt with in more detail below as a particularly important starting point for further development of labour law.

The Development of Collectivist Labour Law in the Weimar Republic

A Definition of Collectivism

The socio-political system of collectivism is characterised by a particular attitude of the state towards the class struggle. The legal system does not negate the class struggle or suppress it, but it does not allow it unlimited freedom; rather it attempts, within the framework of the capitalist system, to determine the way it is conducted by the establishment of legal norms and, over and above this, to utilise the results of each individual stage of conflict for the further development of the law.

In order to be socially effective and practicable, this system presupposes certain facts without which it must fail. There is here a certain affinity between the legal system of collectivism and that of free competition. Both start from the premise that a struggle takes place within the framework of the legal system, and that this struggle, as a conflict between parties of potentially equal strength with potentially equal opportunities, produces a result which is susceptible to legal regulation. The system of competition fails where one of the conflicting parties achieves such a superiority that to engage in conflict would be pointless. The same applies to the collectivist system.

The basic presupposition of the collectivist system is the existence of a certain degree of equilibrium between employers and employees. Only as long as the mutual relations of the two groups remain in this state of equilibrium can the conflict between them be incorporated meaningfully into the legal system and used for its ends. Advances in social policy, the outcome desired by the state, can only arise out of the conflict between the two adversaries as long as the general economic and social situation allows each of the two groups to engage in conflict and does not make one of the two so superior in strength that it can refuse to conclude a peace agreement with the other. The right to competition founders where one of the parties can withdraw from the competitive struggle as a result of achieving a position of real or legal monopoly. Similarly, collectivism must fail where, for a prolonged period of time, the scales are tipped so much in one direction that the whole system of permanent conflict ceases to function. Now it goes without saying that inside the capitalist economic system there exists a natural disequilibrium in favour of the employers' side through their ownership of the means of production and their control of jobs. Where the demand for labour is very great, the employees' side can redress the balance temporarily and to a certain extent by means of industrial action. This counterbalancing process becomes impossible when, in times of crisis, the strike weapon is blunted by the over-supply of labour. In practice this is expressed in

the increasing reluctance of the employers to bargain collectively and thus in a series of break-downs in the collectivist mechanism.

Collective Bargaining and State Intervention

The difficulties encountered by the collectivist system in times of crisis become abundantly clear when we examine the sharp decline in the number of industrial disputes. In the area covered by the General Federation of German Trade Unions (ADGB), 1196 work stoppages involving 571,749 employees took place in 1928, while the figures for 1930 were 636 and 274,486 respectively.[8] The corresponding figures for 1931 are not yet available, but they are certain to be considerably lower.

The state cannot be totally indifferent to these difficulties affecting the functioning of collectivism at a time of worsening economic depression. If it turns out that the state was mistaken in putting its trust in the system of autonomous conflict, then it must necessarily intervene more vigorously with its own social policy measures. The changes in the social function of collective agreements can be explained largely in these terms, in the retreat of the autonomous forces and the advance of the state in the field of social policy. [This change will be examined in four sections: the arbitration system, the role and ideology of the judiciary, the 'extension' of collective agreements and state wage determination and emergency decrees.]

The arbitration system

Right from the outbreak of the Revolution [in November 1918], the state regarded it as its function to support the collective organisations in the conclusion of voluntary agreements. The state fulfilled this function by the use of arbitration proceedings. In the Arbitration Decree (*SchlVO*) of 30 October 1923, arbitration (*Schlichtung*) is defined as the provision of assistance in the conclusion of 'overall agreements' (*Gesamtvereinbarungen*), that is, essentially collective agreements between employers' associations and trade unions. According to this definition, therefore, the promotion of economic peace is not the primary function of state arbitration. Although state arbitration should play a role in settling industrial disputes, this was and is not its basic purpose. Now as before the state affirms industrial conflict. Arbitration should not suppress it. It should intervene to promote agreement, however, when a particular dispute reaches a point at which voluntary joint regulation breaks down. But the law has far exceeded its role by enacting the 'order imposing compulsory effect' (*Verbindlicherklärung*), which allows the arbitration authorities to make an award binding if it

is 'deemed to be equitable on a fair balancing of interests and (if its) implementation (is) necessary for economic and social reasons' (*SchlVO* cl. 6). What this means is that the legal system has entrusted a statutory authority with the decision as to what is equitable in a particular industrial conflict 'on a fair balancing of interests'. If the aim of this kind of compulsory arbitration was to give effect to the balance of power between the conflicting parties in a state award, then it would be nothing more than an institution to avoid a breakdown in collectively agreed terms of employment: the state would not be imposing its view on the substantive issue under dispute. If this were the case, then the Decree would have to state that the arbitration award should be made binding only if its terms were deemed, on a balancing of the relative strength of both sides, to be a true reflection of their relative power at the time. As Herschel has recently shown convincingly,[9] clause 6 of the Arbitration Decree cannot and may not be interpreted in this way. Since, however, it may not be interpreted in this way, the manner in which our system of arbitration has been developed in statute law (not the idea of the order imposing compulsory effect as such) represents a deviation from the original basic idea of collectivism. For, what is meant by equity on a fair balancing of the interests of both sides? That which at any given time the interests of the state and the framework of state social policy determine shall be the substantive terms and conditions of employment. In the Arbitration Decree and the practice connected with it, the concepts of equity (*Billigkeit*), fairness (*Gerechtigkeit*) and balancing of interests (*Abwägung der Interessen*) are used in order to give the stamp of universal validity to the social policy objectives of the state.[10] In truth, an arbitration system with this kind of compulsory arbitration means that, in every case where the parties to collective bargaining cannot reach a voluntary agreement, the conditions of employment cease to represent the outcome of the class struggle and become a reflection of the aims of state social policy.[11] Since, however, state social policy is primarily determined by political power factors, the predominance of arbitration over voluntary negotiation leads to the destruction of the basic idea of collectivism: the regulation of wages and conditions of employment is transferred from the social sphere back into the political sphere.

Some figures may serve to illustrate the advance of compulsory arbitration awards over freely concluded wage agreements. According to *ADGB* statistics for the end of 1929, 3,405,439 workers were covered by collective wage agreements arrived at via direct negotiations, 1,101,275 by settlements arrived at voluntarily after resort to joint or statutory arbitration procedures, but 5,419,463 by arbitration awards.

The correponding figures for the end of 1930 are 3,136,767, 1,238,464 and 5,223,934. The ADGB statistics also show that, in the year up to the end of 1929, proceedings concerning the compulsory imposition of wage rates led to joint agreements between employers and employees covering 298,713 workers, but to orders imposing compulsory effect covering 2,360,000 workers. The corresponding figures for the end of 1930 are 516,899 and 1,834,751.[12]

When assessing the importance of these figures it should be borne in mind that the significance of arbitration proceedings extends far beyond the cases which eventually go to arbitration. For the practice of the arbitration authorities and the more or less certain expectation that an award will be made binding naturally exert an increasing influence on voluntary negotiations. The arbitration system also leaves its mark on voluntary collective agreements, and it is no exaggeration to say that nowadays virtually no wage negotiations are determined by the relative strength of the conflicting parties; they are determined almost without exception by the practice of the arbitration authorities.

We can appreciate the very serious implications of this state of affairs when we call to mind the extent to which state social policy in the crisis is orientated towards goals external to social policy, that is, towards purely economic goals. The arbitration system, originally conceived as a back-up to the collectivist system, then a tool of state social policy, eventually becomes a crucial instrument of state economic planning. What is more, the state uses the legal forms of the collectivist apparatus to implement its policy. The wage cut as a means of promoting exports could only be carried out on the scale it has assumed and as smoothly as it has occurred because the state had the power, in the form of the order imposing compulsory effect, to regulate conditions of employment by its own higher authority.

The change in the function of collective agreements can only be understood if we remember the crucial fact that the award which has been declared compulsory is assumed in law to be in every respect a freely concluded contract. The award has therefore not only the normative effect that exists in the compulsory regulation of conditions of employment, but also the so-called obligatory function. This means that both employers' associations and trade unions, which are assumed to be the contracting parties of the award which has been declared compulsory, are obliged to refrain from taking industrial action in order to change it until the fictitious collective agreement has expired and, over and above this, to actively encourage their members to comply with the award. Should one organisation contravene this obligation, it is liable to be sued for damages by the opposing organisation and its

members. In this way the organisations enter into the service of the state in a far more decisive fashion than in the nomination of lay representatives to bodies constituted under public law. The state uses the organisations to implement its wages policy. The legal system regards the award which has been declared compulsory not as state determination of wages and conditions of employment with penal or criminal sanctions, but as a fictitious contract with sanctions under civil law. The outcome is that the organisations appear as guarantors of the implementation of the social and economic policy of the state, and, as guarantors, they are liable for all their assets. In periods of economic boom, this means that, through the joint effect of the Arbitration Decree (*SchlVO*) and the Decree on Working Time (*AZVO*) (which as mentioned above allows a breach of the statutory eight-hour-day normally only by collective agreement), the trade unions have to put up their assets as a surety for complying with state imposed obligations to do overtime; this is a kind of recompense paid by the union to the state in return for its support in the raising of wages. In the crisis [i.e. post-1929] this has the effect that the unions are obliged, if they wish to avoid being sued for damages, to restrain their members from taking collective action against wage cuts which are a direct result of government economic policy. It is true that in the crisis the arbitration system prevents wages from falling as much as they would have done if the 'free contract of employment' had still determined conditions of employment. It may therefore be true that the arbitration system acts as a brake on falling wage levels. Wages fall more slowly as a result of the arbitration system, but they fall in a more planned fashion. The prevention of a fall to rock bottom is therefore purchased at a price: the workers must implement the wage cuts or risk destroying their own organisations.

This development was the inevitable outcome of the collectivist system. It would be pointless to look for a 'guilty party'. Perhaps it was a mistake to believe that it was possible to realise a collectivist system in a capitalist economy, without recognising that the economic conditions of capitalism allow this system to function only under quite specific circumstances. It was inevitable that the function of collectivism would change fundamentally when confronted by the crisis.

The role and ideology of the judiciary

The idea of autonomous collectivism is not only challenged by the changing function of the arbitration system under the influence of the crisis, but also by the powerful effect of civil service ideology (*Beamtenideologie*) on the development of labour law by judicial interpretation.

To a certain extent there is a contradiction between the ideology of collectivism and the mental attitude which is required in the present state of society for the administration of justice. This contradiction arises out of the relationship between the judges and written law. The philosophy of total positivism, which assumes that law is a completely closed system and that the activity of the judge is confined to a process of logic, has been abandoned in Germany for some time now. This means that the belief in a justice free of subjective evaluation, and the related belief that the activity of the judge is unproblematical, both characteristic of an age attuned to the objectivity and certainty of natural science, have disappeared. On the other hand, very few people today support the conceptual system of natural law, which was typical of a metaphysically-oriented epoch such as the eighteenth century, and which places the judge above state law, allowing him to administer a clearly discernible absolute justice. If it is possible today to talk at all of a generally accepted view of the relationship between the judges and written law, then it would broadly be that the judicial function involves an act of volition in which the value notions of the judge play a decisive role. There is disagreement about where these value notions come from. One interpretation roughly states that they are an expression of the ideology of the class to which the judge is most closely connected. The other interpretation, which could be characterised as a national-relativistic one, sees the judge, as the romantics did, as the expression of the value notions of a distinct national-popular spirit, without claiming that these notions correspond to some kind of absolute justice.

Thus, the intellectual situation of the judiciary when it first came into close contact with the collectivist system was as follows: the idea of the law as a completely closed system had been abandoned, but there was no general recognition of the connection between the process of judicial decision-making and the value notions of the class with which the judge was most closely associated. The term 'class justice' is felt by the overwhelming majority of judges to be an insult rather than what it in fact is, an attempt to characterise the relationship between the judge and written law and more generally the position of the judge in relation to the people as a whole. Thus, the dominant emotional world of the judges approximates most closely to a kind of national romanticism, which arouses in them the belief that they are administering general value notions shared by the people as a whole, without however claiming that these value notions necessarily correspond to some kind of ideal of absolute justice.

This internal dilemma of the judiciary, which arises inevitably out of the role assigned to it in a class-divided society, leads to a situation

where, in the interests of intellectual self-preservation and their own professional ethics, the judges must avoid situations of social tension as far as is practicable, indeed they must attempt to deny their existence. Where possible the judges must disregard in their day-to-day activity the fact that the social structure of the legal community itself produces typical situations of pressure and tension and that completely different values and ideologies exist within the legal profession. If the judges wish to locate their position in the social structure, they can only do this by broadly upholding the fiction of a conflict-free legal community with common value notions. If the judge lives and works according to this fiction, he is then in a position, with no internal conflicts and with a clear conscience, to interpret his socially determined value notions as expressions of the general will of the people. As a result he is able to arrive at 'universally valid' definitions of 'public policy' and 'good faith' etc. In the administration of justice, therefore, there is a tendency not to perceive situations of conflict and also not to see things as changing over time, but as existing in a state of inertia. Only in this way is it possible to assume the existence of universally valid and constant value notions. It was, therefore, not only the general de-politicising tendency of every civil service,[13] but also especially the intellectual situation of the post-war period, which induced the judges to adopt a static conception of society. Consciously or unconsciously, this conception informs all their decisions. They see society not in a state of perpetual change but in a state of rest and repose.

It goes without saying that this static view of society stands in complete contradiction to the collectivist system of ideas, which is based explicitly on a dynamic conception of the social foundations of the legal system and cannot recognise any particular condition of society as final. However, what was originally thought of as a transition stage became in the hands of the judiciary something final. The idea that social conflict is not only tolerated but is actually desired by the state to further develop the law may appear as a commonplace to political parties involved in parliamentary compromise, but it is generally foreign to the nature of independent judges. For them peace, order and *consensus omnium* is the eternal, constant, social ideal. As a result of its own structure, the judiciary must reject the idea of the further development of the law through social conflict, and, whether it wants to or not, it must limit the area inside which social conflict may be freely conducted to such an extent that it actually threatens the very idea of collectivism. It must also derive its value notions from civil service ideology and instill them in the consciousness of the people as universally recognised ideals. In other words, it must replace collectivist conflict and its outcome by a

civil service social ideal as the basic framework for the further development of labour law.[14]

The extent to which the *Reich* Labour Court (*Reichsarbeitsgericht*), the highest appellate court in matters concerned with employment, sees conflict not as a law-creating force and a permanent dialectical process but as a breakdown in order is demonstrated by its decisions on disputes between trade unions and employers' associations. State intervention has been taking place in this area through judicial interpretations of the law in a way which is no longer compatible with the basic principles of the collectivist system. The *Reich* Labour Court has not been content simply to determine the weapons which the conflicting groups are allowed to use, it has proceeded to stipulate the objectives for which a conflict may be conducted. This approach is totally incompatible with a dialectical conception of conflict. In terms of dialectical thought, it is conflict itself that is the motive force of social development. Its objective is determined by the interests of the class which is conducting it. Within the capitalist system, the state, inasmuch as it affirms conflict at all, can only regulate its 'how', not its 'what for'. However, by its decision of 19 March 1930,[15] the *Reich* Labour Court has gone down the opposite road by declaring every conflict which is not being conducted for recognised economic objectives to be in breach of collective bargaining law. The Court enters the same kind of territory when it stigmatises every 'simple practical assertion of trade union power',[16] which has no recognised economic objective, as contrary to public policy. In these decisions, the judiciary is invoking an ideal of economic peace according to which employers' associations and trade unions are not organisations of struggle but instruments for keeping the peace.

However, the retreat of the idea of conflict and the advance of the idea of the subordination of the organisations to the political objectives of the state are characteristic of other fields of judicial interpretation, particularly of decisions in which the *Reich* Labour Court expresses its view of the basic functions of organisations. In two decisions of 10 April 1929,[17] the Court stated that, according to the system established under the Weimar Constitution (*RV*), trade unions and employers' associations have a status under public law and that the power to conclude collective agreements has been transferred to them in the interests of public law. Thus, the *Reich* Labour Court regards the power to conclude collective agreements not as an expression of state policy to affirm the class struggle and to endorse its outcome at any given time, but as a conscious attempt by the state to use the organisations to carry out its own social policy objectives. Thus, in the conceptual world of the judiciary, the associations become a particular kind of state body. The relationship between the

state and the organisations is thereby reversed. The state no longer leaves a large area of working life to the autonomous regulation of the organisations, intervening only to assist them in achieving their objectives; on the contrary the organisations enter into the service of the state in the very process of carrying out their autonomous role. They become public institutions.

Similar attitudes predominate where the courts have to decide which organisations should be recognised as the bearers of collectivist autonomy, that is, in cases concerned with the definition of the capacity to conclude collective agreements. The collectivist system is totally unable to function unless there are organisations on both sides which have the will and the capacity to engage in conflict. If an organisation refuses or is not in a position to venture into the field of legally recognised conflict, then it has no place in the framework of the collectivist system. Despite this, the *Reich* Labour Court does not recognise the will and the capacity to engage in conflict as a defining characteristic of the capacity to conclude collective agreements.[18]

As a result of its rigid conception of order and its civil service ideology of public provision (*Versorgung*), the judiciary sees social policy only in terms of welfare (*Fürsorge*), and not in terms of the organised autonomous pursuit of group interests. Inasmuch as they are concerned with questions of the working life of the individual, the judicial interpretations of the *Reich* Labour Court thus tend in the direction of welfare and public provision.[19]

Together with the arbitration system, judicial interpretations tend to have the effect of excluding conflict as a law-creating factor and subordinating the organisations to the objectives of the state.

The 'extension' of collective agreements

The practice of the 'extension' (*Allgemeinverbindlicherklärung*) of collective agreements has undergone a similar change in function, starting as a measure to promote collectivism and ending as an instrument of state social policy. In its original intention, 'extension' meant the possibility of removing the advantage of the unorganised worker over the organised worker in the labour market, and thus of abolishing one obstacle to the formation and growth of collective organisation. From the point of view of the employer, 'extension' served also to underline the function of the collective agreement as a limited kind of cartel to regulate production costs. For the ability of employers' federations to control wages in non-member firms meant the creation of a kind of compulsory cartel covering the human costs of production. From the beginning, however, the introduction of 'extension' represented a danger

for the organisations. For the guarantee of the automatic compulsory effect of collectively agreed wage rates, which applied also to unorganised workers, weakened the effectiveness of one of the powerful factors stimulating the formation of organisations, namely, the prospect of enjoying the legally guaranteed, collectively agreed conditions of employment. Henceforth, the unorganised worker, without the burden and inconvenience of joining a trade union, was to share in advantages which until then he would have enjoyed only on the precondition that he belonged to a collective organisation. Here once again the dual face of collectivism towards the relationship between the state and the organisations is revealed. The state contributes to the advancement of the associations when it intervenes in their support through the extension of collective agreements, but it also puts obstacles in their way by allowing individuals to enjoy advantages which are not simply the product of the militancy and the strength of collective organisation. The exclusion of advocates and other professionals from representing employers and employees before labour tribunals is but a limited compensation for the disadvantages resulting from 'extension'. The exclusive right of the unions to represent their members before tribunals appears as a 'connecting institution' (in the sense of Renner's legal sociology)[20] of the 'extension' of collective agreements.

If this change in function was, from the very beginning, an inherent element in the principle of extension, then another change resulted from the way in which it was applied. According to the relevant clause of the Collective Agreements Order (*TVO* cl. 2), the 'extension' of a collective agreement presupposes its predominant importance (*überwiegende Bedeutung*). In practice, this has been applied in such a way that collective agreements have been extended in several cases where the parties to the agreement had in membership only a minority of the total number of employees in a particular occupation. This applies particularly to terms and conditions for salaried employees, which are predominantly regulated by 'extension'. According to the statistics of the *AfA-Bund*[21] for the end of 1929, 65.2% of all salaried employees included in the survey were covered by salary agreements, and 63.3% by general framework agreements (*Manteltarife*), 'by extension'. Since union density among salaried employees is typically low, this means that large numbers of unorganised salaried employees have come to enjoy the advantages of collective bargaining without having ever inwardly assimilated the idea of collective organisation. For the great mass of salaried employees, therefore, collective bargaining law appears in practice to be a continuation of pre-war state social policy pure and simple, particularly when it is taken together with the effects of the Law of Protection against

Dismissal (*KSG*) of 9 July 1926, which has prolonged the period of notice of dismissal for older salaried employees.

State wage determination and emergency decrees

Inasmuch as they represent a retreat from the idea of collectivism, the trends we have outlined above have been continued and intensified in the provisions of the emergency decrees (*Notverordnungen*) issued since the middle of 1930.

We have already seen how the state has increasingly penetrated the arbitration system, using the autonomous organisations to implement state wage policy by making them liable for all their assets. The idea of a system of state wage boards (*staatliches Lohnamtsystem*), that is, state determination of terms and conditions of employment, has been taken further by the provisions of the Emergency Decrees of 9 June and 27 September 1931. As a result of these decrees, the practical force of the decision of the *Reich* Labour Court (29 January 1929) to prohibit the use of the casting vote by the chairman of an arbitration panel has been suspended. The arbitrator, who is dependent for his instructions on the *Reich* Minister of Labour, is now able, by formally calling on the assistance of two further 'neutrals', to make an award which is not supported by a majority of the full panel. This means that state wage policy can be successfully enforced even when it is not possible to gain the support of the autonomous forces represented on the arbitration authorities, which are composed of state officials as well as representatives of employers' associations and trade unions. It is well known that both decrees owed their origin to the threat of an industrial dispute in the coalmining industry of North-Rhine Westphalia. On the one hand, the state could not simply stand idly by while coal production was brought to a standstill. On the other hand, at a time of high unemployment in the mining industry, it could not allow the dictatorial power of the employers to determine wage levels unilaterally by means of the so-called free contract of employment. This case shows particularly clearly how the failure of the autonomous approach compels the state to introduce a system of wage boards.

This trend was powerfully reinforced by the so-called Decrees to Safeguard Economic and Financial Stability. Under the terms of the 1st Decree of 1 December 1930 (Part II, s. 2(5) and (6)), the state intervened for the first time in collective agreements currently in force. In order to give the *Reich*, and the regional, local and other public authorities the possibility of cutting the salaries of white-collar workers in line with the cuts in the salaries of civil servants, all relevant public or semi-public employers were permitted to give premature notice of termination not

only of individual contracts of employment but also of collective agreements, although it is true that this extraordinary notice was permissible only if linked with a particular purpose, that is, it had to be coupled with the offer of a new collective agreement.

State intervention in the system of collective bargaining went one step further with the 2nd Decree of 5 June 1931 (Part II, s. 1(6) (7) and (8)). In this decree, the government was not content with giving public employers the right to terminate an agreement for the purpose of cutting wages, it also declared that, on the expiry of collective agreements currently in force, previously existing wage rates (with certain cuts) should continue to operate as the collectively agreed terms. This was to have compulsory normative effect for *Reich*, regional, local and other public and semi-public authorities, corporations, institutions, enterprises etc. We are dealing here with an outright wage decree, even though the fiction of autonomous agreement was still upheld. This fiction represented a retrospective concession to the idea of autonomy, although it had virtually no practical significance.

An important point in this development was reached with the promulgation of the 4th Emergency Decree on 8 December 1931. The previous measures had only covered employees in public and semi-public corporations and enterprises. Until then, the government's policy of cutting wages had impinged on employees in the private sector only through the arbitration system. Henceforth, however, the government proceeded to by-pass both collective agreements and the arbitration system and to determine wage levels in private firms, using the provisions on wage reductions in the 4th Emergency Decree (Part VI, s. 1). All collectively agreed salaries and wages (but not those settled by individual contract of employment) are reduced with effect from 1 January 1932 to the level of the relevant collective agreement of 10 January 1927, with a minimum reduction of 10% or, in exceptional cases, of 15%. The only task left for the parties to collective bargaining is to work out the application of the provisions of the decree and to attach the new figures in written form as an appendix to the existing collective agreement. In cases of a failure to agree this task is to be discharged by the appropriate arbitrator or by the *Reich* Minister of Labour. This can under no circumstances be regarded as a special kind of arbitration, in which a fair settlement is sought after due consideration of the situation of the particular branch of industry. It involves the much more limited task of implementing the wage or salary cut already pre-determined by the decree. The arbitrator is only given limited discretion to take into consideration changes in the system of wage and salary payment which have taken place since the conclusion of the agreement operative on 10 January

1927. On the other hand, the arbitrator or the *Reich* Minister of Labour has the widest possible powers to intervene in other non-wage areas covered by collective agreements. In fact these powers were used by the government in the 4th Emergency Decree of 8 December 1931 to change collectively agreed wage rates; in order to do this, it had to suspend the effect of the decision of the *Reich* Labour Court of 22 January 1929. (This decision concerned the dispute in the Ruhr iron industry,[23] and prohibited the intervention of the arbitration authorities in current collective agreements.)

It is particularly important that the decree covers only collectively agreed wages and salaries, not those determined by the individual contract of employment. In times of economic expansion, arbitration guarantees uniform increases in wages also for those groups of employees who are not in a position to fight for them; in times of crisis, the institutions of collective law operate in such a way that those groups of employees covered by collective agreements are the first to be affected by wage cuts.

The 4th Emergency Decree represents a far more emphatic reversal for the collectivist system than the other three. For the state now abandons even the fiction that the changes it requires are collectively agreed, imposing them on the parties to collective bargaining by an act of law. The only task left for the collective organisations is to act as a kind of executive organ of the state; they are reduced to calculating the effects of the statutorily imposed changes.

At the same time, the decree leads to a further, no less serious encroachment on the freedom of the organisations to make agreements and to take industrial action, declaring that no collective agreements in operation on 1 January 1932 may be terminated before 30 April 1932. In this instance, then, the state is tying the collective parties to their own intention to be contractually bound for a period possibly longer than they themselves had agreed upon. This shows with particular clarity the extent to which the collective agreement has changed from an expression of collective conflict into an instrument of state wage policy.

Finally, the same Emergency Decree (Part VII, s. 6(6)) has established an extensive automatic intervention in the collectively agreed wages of employees in public corporations; here too the current collective agreements have been prolonged until 30 April 1932.

Step by step, the law embodied in the emergency decrees develops further and further away from the basic idea of collectivism. It began with the right under specific circumstances to terminate particular terms in the collective agreements covering public employees, and proceeded, via the prolongation of the expiry date of such agreements,

to the state determination of wage rates and intervention in all collective agreements in the whole of the economy. In the overall context of our examination thus far, these measures contained in the emergency decrees appear not just as an expression of a momentary situation of crisis, but as the logical progression along a road which had already been prepared by the practice of arbitration and by judicial interpretation. This development can be characterised in the following way: terms and conditions of employment are not determined by the autonomous joint agreement of the participant groups, as originally intended under the collectivist system, but by the requirements of state social policy at any given time.

The System of Works Councils

The change in function of labour law is not confined to the system of collective bargaining. It also embraces other elements of the collectivist system where a similar line of development can be traced. Particularly important in this respect is the change which has taken place in the function of the works councils.

As already emphasised above, the elaboration of the system of works councils was an essential part of the original collectivist system. Hence, the section in the Law of Works Councils which left intact the powers of the trade unions to protect the interests of their members (*BRG* s. 8); the subordination of the activity of the works councils to the terms of the relevant collective agreements, proclaimed at many points in the Act (*BRG* s. 66(3)(4)(5) and s. 78(1)(2)(3)); the possibility of inviting the attendance of trade union representatives at works council meetings (*BRG* s. 31) and at works meetings (*Betriebsversammlungen*) (*BRG* s. 47); finally, and most importantly, the special protection against dismissal for employee representatives (*BRG* s. 96). All these measures emphatically extended the influence of the trade unions beyond the field covered by collective bargaining law into the detailed daily questions of plant life and thus into the smaller everyday disputes which are often of crucial importance for the individual. In addition, the appeals procedure against dismissal (*BRG* s. 84ff.), which gives employee representatives in plants with 20 or more employees the possibility within certain limits of checking the reasons for dismissal, means in practice a strengthening of the organisations, even if this was perhaps not the original intention of the Act.

Apart from its significance for the strengthening of the idea of trade unionism, the Law of Works Councils fulfils, according to its original conception, two different functions. Firstly, it has the task within certain limits of realising the collectivist idea at works level. It does this by organising the workforce and giving it a representative body, which

has equal rights with the employer, to protect its interests. At the same time, however, the Law of Works Councils was conceived as one of the points of departure for the socialisation of the economy (*Sozialisierung*).[24] The works (*Betrieb*) was adjudged to have an objective (*Zweck*) which transcended the profit interest of the entrepreneur, the employee representatives were called upon to work together with the employer in the interests of the 'works objective' (*Betriebszweck*) so defined (*BRG* s. 1, 66(1) and (2)). This economic policy function of the works council is only meaningful as one element of a transition from a capitalist to a socialist economy, a transition stage in which admittedly the self-interest of the entrepreneur remains in existence, but where in the interests of the national economy the enterprise is subject in a number of ways to extensive control focused on the achievement of its macro-economic works objective. The concept of works objective is a macro-economic and not a private-economic one. This is because, for the private sector of the economy, the concept of works objective is identical with the profit interest. However, since the socialisation of the economy remained a dead letter, whereas the economic policy function turned into its opposite. It was inevitable that it would remain completely meaningless in terms of a real influence of employees on the overall management of the works.[25] Under the influence of judicial practice, however, it developed into a restriction of the works council's legal right to represent the collective interests of employees on economic policy issues. The 'works objective', which in the context of a socialist economy (or one involved in the transition to socialism) would be a real macro-economic entity, namely, the macro-economic utility of the particular enterprise, changed in the context of a restoration of capitalism into the fiction of a neutral third power, comprising both employer and employees. The employees had to reconcile themselves to the fact that their right to participate in works management in the interests of the national economy was transformed over time into a restriction of their socio-political rights vis-à-vis the employer in the interests of the capitalist 'works' (*Betrieb*), which was and is in reality nothing more than another name for the interests of the entrepreneur. Thus, what was originally intended as a starting point for the socialisation of the economy became a limitation on collectivism.

By interpreting the concept of *Betrieb* in this way, the judges were acting once again in accordance with the general position of the judiciary in a class-divided society. The *Reich* Labour Court was using a form of reasoning which is applied in other areas of the administration of justice and which is intimately bound up with the problematical position of the judiciary (as described above) in a society without generally accepted

value notions. The technique used is that of the reification of objectives. Since the judges, in order to be able to function at all, have to assume the existence of consensual value concepts and ethical notions, even where they do not exist, and since in a state governed by the rule of law no one social interest can or may be blatantly played off against another, the judiciary is forced to replace the protection of group interests by the protection of specific objective values and principles, and to assume that the latter are both generally recognised and necessary. The *Betrieb* is such a reified objective. In the judgments of the *Reich* Labour Court, it is consistently defined as the production- and work-community existing between entrepreneur and workforce. The *Reich* Labour Court does not recognise the right of the members of the works council to protect unilaterally the interests of the workforce they represent, instead it demands that they should take equal account of the interests of the workforce and those of the *Betrieb*.[26] Moreover, the individual employee is required in certain cases to work additional overtime beyond the statutory limit 'in the interests of the *Betrieb*',[27] and, in a much disputed judgment, the Court has attempted to solve the problem of works risk (*Betriebsrisiko*), i.e. the question of the right to payment of wages when no work is done through no fault[28] of either party, by means of its own interpretation of the concept of *Betrieb*. According to this interpretation of the law, the general notion of good faith as applied to the employment relationship means that both parties must work together in the interests of the production- and work-community (i.e. the *Betrieb*) as of a higher third power. Here the reification is unmistakable. An abstract notion, namely the harmonious co-operation of employer and employee, is clothed with the romantic metaphor of the organism and reified into an object called *Betrieb*; the conflicting parties have to subordinate themselves to this metaphorical construct in the pursuit of their interests.[29] It may be that this reification of objectives is a repetition of a process which occurred in earlier times in the broader field of political history, where the concept of the state assumed a position above social conflicts, thereby helping to conceal the existence of the domination of man by man and of classes by classes. In similar fashion today, with the increasing legal regulation of economic and social processes, the dual need of the bureaucracy becomes everywhere apparent: to mask the existence of social relations of domination and conflict through the fiction of superimposed objective constructs, and, with the help of these objective constructs, to establish supposedly generally accepted value notions as the points of reference for policy- and decision-making.

However, another aspect of the works council system has also been subject to a considerable change in function in the period since the Law

of Works Councils was first drafted. The germ of this transformation was contained from the beginning within the social policy function of the works council. In the Draft Law of Works Councils which was submitted to the National Assembly [in 1919], the workforce was treated as a unified whole. The strong influence of the bourgeois white-collar organisations on the bourgeois coalition parties ensured, however, that the fateful division between salaried employees (*Angestellte*) and manual workers (*Arbeiter*) was also carried over into the Law of Works Councils. From the point of view of the collectivist system, this division, whose significance in the context of pre-war legislation has been shown above, represented both a restriction and a step backwards compared with the Draft Law of 1919.

This division has assumed great importance in the operation of the appeals procedure against dismissals. The fate of the provisions relating to protection against dismissal is typical of the direction taken by collectivist labour law. According to the original government draft, the appeals procedure was to provide a real guarantee of a job; no decision could be taken without the explicit agreement of the works council, itself under the controlling influence of the trade unions. This legal idea contained in the Draft was perverted in two ways by the coalition parties of the National Assembly. Firstly, the right of appeal was taken away from the workers' representatives and transferred to the individual employee who had been dismissed, although with the proviso that the appeal can proceed only if it is approved by the appropriate representative body (*BRG* s. 86). Thus what was originally intended as a collective right became classified as an individual one. The second perversion lay in the introduction of the compensation principle, whereby the employer can buy himself out of the obligation to continue to employ the dismissed person through the payment of a certain sum of money (*BRG* s. 87). Thus the guarantee of a job was transformed into a right to compensation and thereby robbed of its basic character. Finally, the appeals procedure was dealt a decisive blow as a result of the Arbitration Decree of the 30 October 1923 (*SchlVO* cl. 2) and the Law of Labour Tribunals of 1926 (*AGG* s. 2(1)(4)). Prior to the issue of the Arbitration Decree, an administrative authority, the Arbitration Committee (*Schlichtungsausschuss*), had decided appeals by means of *ex officio* inquisitorial proceedings. Under the new regulations, however, the decision on the appeal was transferred to the labour tribunals to be disposed of in adversary proceedings in accordance with the rules of civil procedure. Disputes over dismissals were thereby classified as ordinary grievances between the individual employer and employee. The result of this has been that the tribunals, by implementing and partly by incorrectly applying ordinary

civil procedure principles on the burden of proof, have progressively reduced to nil the significance of the appeals procedure as a possibility for reviewing industrial relations at plant level in the interests of the workforce. Disputes conducted through the appeals procedure have become ordinary civil proceedings without any basic connection to the collectivist system.

Under the impact of the crisis, even those employees who are immediately affected by dismissal or redundancy are almost completely unaware of the connection between the appeals procedure and the collective interests of the workforce. Large sections of the working class now regard this procedure simply as a means of claiming compensation in cases of redundancy, an attitude which has been powerfully reinforced by the split between salaried employees and manual workers already mentioned above. As early as 1930 the number of appeals by salaried employees was unusually high as a result of the increasing number of redundancies, a fact shown by the official statistics of the Ministry of Justice.[30] In 1930 there were 20,813 appeals by manual workers in the whole of the *Reich* compared with 14, 673 by salaried employees, and it can be assumed with some certainty that, with the continued increase in the numbers of white-collar redundancies, the number of appeals by salaried employees in 1931, for which the figures are not yet available, will have again grown in proportion to the overall total. The appeals procedure is thus used to an extraordinarily large extent by that group of employees whose inner commitment to the idea of collectivism is comparatively poorly developed. Their lack of collectivist consciousness has been particularly reinforced by the establishment of separate representative councils for salaried employees and manual workers at plant level, and the transfer to these group councils (*Gruppenräte*) of competence in all matters relating to appeals; this means that salaried employees and manual workers have no contact with one another in the question of dismissals and redundancy.

Conclusion: the Uncertain Future of the Collectivist System in Germany

The road which labour law has taken since the revolution proves that collectivism has come up against difficulties which have their origins in the fundamental nature of the capitalist system and in the sociological composition of the proletariat. We have seen in a number of different areas that it is not, or not yet, possible to regulate conditions of employment by giving effect to the outcome of the class struggle at any given time. Repeatedly and increasingly the state itself has been forced to

intervene in social policy, indeed in some cases with methods which are a direct development of the German Law welfare tendency of the pre-war-period. The classic illustration is provided by the Law of Protection against Dismissal (*KSG*) of 9 July 1926, which has conferred a degree of protection on older white-collar workers (who are on the whole poorly organised) by lengthening the minimum period of notice of dismissal. By this law, as well as by separating salaried employees and manual workers, the legislature has perpetuated at works level the distinction between the two elements within the proletariat which lay at the heart of all pre-war legislation.[31] The very fact that trade union consciousness is still poorly developed amongst salaried employees necessitated this intervention by the state. Here, as in other respects, legislative action has accentuated the dividing line between salaried employees and workers instead of obliterating it in the spirit of collectivism.[32] There is probably an integral link between the transfer of the conflict about conditions of employment from the social sphere back to the political sphere and the growing importance of white-collar workers within employment legislation; for the political power of white-collar workers is superior to their economic strength.[33] Their influence within the political parties is greater than the numerical membership strength of their organisations. Through their 'connections' with the bourgeois political parties, salaried employees are able to achieve political successes which they could never have achieved by means of collective industrial action.

As has been shown at many points, the collectivist apparatus has been replaced to a large extent by a system of state wage boards, even if the pure form of the wage board has only been established in that area where the organisational strength of the employees is weakest, namely among homeworkers (Determination of Payment by Expert Committees according to the Law on Wages for Homeworkers (*Heimarbeiterlohngesetz*) of 27 June 1923).

The collectivist system represents an attempt to legalise the class struggle and make it an integral component of the further development of the legal system. The inevitable result of this tendency of the collectivist system is a situation of tension, which has to this day been a basic feature of German labour law and has become the most fundamental cause of its change in function. On the one hand the state legal system recognises the existence of classes and class contradictions, in fact the necessity of class conflict. On the other hand, state power (*Staatsgewalt*) avoids taking sides in this conflict. Is it possible to legalise the class struggle in a class-divided society and to make it a component of the legal system? Can the state recognise the idea of class and yet remain 'neutral'? Must not the conflict eventually break up the legal system or

the legal system suppress the conflict? It is impossible to answer these questions from the perspective of the present crisis. Only a renewed strengthening of the organisational power of the working class when the economy starts to grow again can teach us whether the collectivist system can achieve new life in a different economic situation.

Notes

1. These preliminary methodological remarks are a development of the basic ideas contained in Karl Renner, *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion*, 2nd edition, 1929, particularly pp. 12ff.
2. Cf. Renner, ibid., p. 152.
3. Cf. for example sections 617 and 618 of the Civil Code (*BGB*). The inclusion of these and similar provisions was largely the result of the criticism made by Gierke (*Der Entwurf eines bürgerlichen Gesetzbuchs und das deutsche Recht*, 2nd edition (1889)) of the *First Draft of a Civil Code* of 1888, which was strongly influenced by Roman Law.
4. Originally they were completely outside the area covered by the Industrial Code (*GewO*). The present legal situation was only brought about by the amendments of 1891 and 1900. Cf. Walter Kaskel, *Arbeitsrecht*, 3rd edition, p. 69.
5. Cf. Hugo Sinzheimer, *Ein Arbeitstarifgesetz*, 1916.
6. Cf. the statistics in *Tarifverträge der freien Angestelltenverbände*, edited by the white-collar trade union confederation (*AfA-Bund*) (Berlin, 1931), p. 3.
7. Cf. Sinzheimer, op.cit., p. 49, and Gierke's critical response in the *Archiv für Sozialwissenschaft*, 42 (1917) 815ff., particularly 821–22.
8. *Die Tarifverträge in Deutschland Ende 1930 mit den Ergebnissen der Tarifbewegungen in den Jahren 1930 und 1931*; Results of the Collective Bargaining Statistics of the ADGB, 2nd special edition of *Gewerkschaftszeitung*, (1932).
9. Cf. Herschel, *Grundfragen der Schlichtung im Lichte der Rechtswissenschaft*, publications of the Institute for Labour Law at the University of Leipzig, Vol. 28, pp. 70ff.
10. Just as, in the framework of judge-made social policy, the concepts of equity, fairness, public policy and *bona fide* legal relations serve to mask a static social ideal akin to that of the civil service.
11. On the political character of arbitration see the very pertinent comments of Herschel, op.cit., pp. 80ff.
12. Cf. *ADGB Statistics* (1932), Table XI, p. 28; also the corresponding figures in the *AfA-Bund Statistics* (1931), table VIII, pp. 48–9.
13. Karl Mannheim, *Ideologie und Utopie*, pp. 77ff.
14. For further details and evidence on this point I would refer readers to my study, *Das soziale Ideal des Reichsarbeitsgerichts* (1931).
15. *Bensh. Samml.*, Vol. 9, No. 58, p. 254.
16. Cf. the evidence contained in the publication mentioned above, p. 21.

17. *Bensh. Samml.*, Vol. 5, No. 134, p. 537, and No. 185, p. 543.
18. *Bensh. Samml.*, Vol. 4, No. 63, p. 239, Vol. 4, No. 78, p. 294, Vol. 5, No. 57, p. 217, Vol. 9, No. 107, p. 487.
19. Cf. Franz Neumann, *Die politische und soziale Bedeutung der arbeitsgerichtlichen Rechtsprechung*, (Berlin, 1929) [reprinted in T. Ramm (1966), p. 134ff.]. Cf. also my study cited in note 14.
20. Cf. Renner (1929), op.cit., p. 26.
21. *AfA-Bund Statistics* (1931), table XI, p. 18, p. 53.
22. *Bensh. Samml.*, Vol. 5, No. 50, p. 167.
23. Ibid.
24. Cf. on this issue Ernst Fraenkel, 'Zehn Jahre Betriebsrätegesetz', *Gesellschaft*, February 1930.
25. Its minimal importance was still further reduced by judicial interpretation. Cf. the decision of the *Reich* Labour Court (26 February 1930), in *Bensh. Samml.*, Vol. 8, No. 106, pp. 519ff.
26. *Bensh. Samml.*, Vol. 6, No. 82, p. 335 and elsewhere.
27. Ibid., Vol. 4, No. 99, p. 381, Vol. 6, No. 63, p. 253.
28. Decision of the *Reich* Labour Court, 20 June 1928, ibid., Vol. 3, No. 35, p. 116 and elsewhere; cf. already *Reichsgazettenzeitung* (*RGZ*), Vol. 106, p. 272.
29. That we are not concerned here with an isolated phenomenon but with a typical process of contemporary judicial thinking can be demonstrated by the similar situation in company law, where, in the analogous case of a conflict between the company management and the shareholders, the reified interest of the 'company' (*Gesellschaft*) comes into play as a superimposed third power and where the violation of public policy becomes in practice synonymous with an act against the interests of the company. That this form of thinking is not confined to the judiciary but also affects the legislature itself is demonstrated by the Draft Companies Act and the Memorandum of Policy accompanying it (*Entwurf eines Gesetzes über Aktiengesellschaften and Kommanditgesellschaften auf Aktien*, published by the *Reich* Ministry of Justice, sections 84, 88 etc., Memorandum of Policy (*Begründung*), p. 94 and elsewhere).
30. Cf. the reproduction of these figures in Wogan, *Das Arbeitsgericht* (1931), p. 391.
31. The recent legislation by Emergency Decree has continued down this road, in that the claim of all salaried employees to payment in case of illness has been elevated to the status of mandatory law (Decree of 1 December 1930, Part I, s. 2(3)). As for manual workers, the previous legal position continues to operate, moreover with the agreement of their trade unions.
32. Cf. Nörpel in *Die Arbeit*, 1931, p. 580.
33. On the relation between the political and social power of the working class and the significance of the interplay between the two kinds of power position, see Ernst Fraenkel, 'Die politische Bedeutung des Arbeitsrechts', *Gesellschaft*, January 1932.

Part III

5

Postscript by Otto Kahn-Freund

The Weimar Writings[1]

The Historical Background

It is important to understand the historical background of the Weimar Republic in order to see the attitude which is revealed in those early writings. Some time ago, I had a correspondence with Henry Phelps Brown about what he calls the conflictual and the non-conflictual view of society – this was, in a sense, a correspondence about Marxism. And I pointed out to him that he grew up in a society totally different from the one in which I grew up. In his book, *The Growth of British Industrial Relations*,[2] he prints a very impressive photograph of boys in a school in Bermondsey (a real working-class area) in 1894 and again in 1924, and the contrast is staggering. And I wrote to him: the little boys in the working-class areas in Berlin under the Weimar Republic still looked like your boys of 1894 and not like those of 1924. It was a society in which the conflictual element was more palpable, more visible to the eye. I am also convinced that it was objectively stronger. This is part of what I wrote in 1931 and 1932. I am convinced that the term 'working class' in the Marxist sense had a much clearer meaning in the Germany of 1930 than in the England of 1930. The concluding words of the *Communist Manifesto*[3] – *'Nichts zu verlieren als eure Ketten . . . und eine Welt zu gewinnen'* ('Nothing to lose but your chains, and a world to win') – really made sense in Germany in 1930.

Intellectual and Ideological Influences

I have never been what in Germany was called an 'orthodox Marxist', but I was strongly influenced by Marxist analysis, and I suppose I still am. Since my young days, I have accepted that one's existence has a strong influence on one's thoughts. The point is much more radically put in Marxist theory as the classical statement that Marx put Hegel, who was standing on his head, back on his feet. This goes for my own existence. I am not one of those utter conservatives whose views are

uninfluenced by the change of the world and of the environment in which they live. Certainly not one of those who think that a concept of society, developed out of facts in part of the world much more than a century ago, can be applied to all countries at all times. More to the point: the society and, above all, the body politic which were the background against which I wrote half a century ago were different from the society and the body politic in Britain today.

I must also mention two other major intellectual influences on my work: Hugo Sinzheimer and Max Weber. Sinzheimer was, of course, of immense importance, and in order to understand him, you really need to read his first two books, *The Collective Agreement* (1907/8) and *A Statute on Collective Agreements* (1916).[4] *The Collective Agreement* was one of the first books where a lawyer applied an empirical method. The book consisted of two volumes, and the first is almost entirely a systematised empirical study, the study of actual agreements. It is difficult to say that it was suggested to him by the Webbs, but it shows perhaps that he knew them. There is inherent in Sinzheimer's work the very point which Allan Flanders criticised in the Webbs, that is, the purely economic conception of collective bargaining.[5] I'm not saying that this is explicit in Sinzheimer's writings (he was not able to read English, but there was a German translation of *Industrial Democracy* which he must have read), but I know he was very much influenced by the Webbs.[6] I think that if Sinzheimer and Sidney Webb had ever met, they would have had a lot in common. He would have probably had more in common with Sidney that with Beatrice. In fact, the influence of the Webbs outside Britain is something which has not yet been investigated. It was immense, because nobody had done that kind of work. They were pioneers.

I am obviously also greatly influenced by Max Weber, particularly by the part of *Economy and Society* which has been published separately under the title of the 'Sociology of Law'.[7] This has made an immense impression on me, and that, I suppose, is reflected in my writings. When I wrote the first edition of *Labour and the Law*, I was not conscious of the influence of Max Weber, and that shows how strong his influence is. This is, of course, the strongest influence that anybody can have: if the donee of the influence begins to think that the ideas which he has taken over from the donor are his own. He was a towering figure, a loner, a giant in a land of dwarfs. Despite this, I must stress that I am not a sociologist, I am a lawyer interested in sociology, not a sociologist interested in law.

Finally, it would be wrong if I didn't mention the fact that I am Jewish. You may find this a little staggering, but the fact that one is a

Jew is the most important fact in one's life. My own critical attitude towards the society in which I lived was reinforced, or perhaps more than reinforced, by the fact that I belonged to a minority which in some ways was discriminated against. That was something of which I was aware from childhood.

My Early Writings

The response to these publications in Germany at the time is partly to be explained in purely personal terms. The 1931 publication was absolutely rejected by the ADGB, the equivalent of the TUC. It's only now that I realise to what extent they rejected it.[8] The ADGB had a Legal Department, and the Head of this Department was a man called Clemens Nörpel. He was the most legalistic-minded person I think I have ever met in my life. He was far more legalistic than any lawyer can be. He was highly intelligent, immensely knowledgeable, and an anti-semite. The last of these facts was not really known to me, but, apart from his anti-semitism, he also had an intense antagonism to my person. He was furious about the book on the *Reich* Labour Court. What I didn't realise was that he circularised professors in the Law Faculties who specialised in labour law in order to denounce it. Of course he saw in the book, and not without reason, a criticism of the unions. Earlier, my friend Flatow, who was in charge of labour law in the Prussian Ministry of Trade (there was a separate Ministry of Labour in the *Reich*) had tried to get me into the Ministry as a civil servant, and had talked with the Secretary of State about it. But it was prevented by the ADGB: they couldn't make an appointment against the wishes of the ADGB. This explains partly, but only partly, the negative attitude of the unions, although, generally speaking, trade unionists wouldn't read a book like that.

On the side of the employers, there was at first nothing at all (you would have expected a much more violent response on the part of the employers), and nothing on the part of the civil service or the judiciary. Then something happened which made the employers sit up. One of the leading employer lawyers wrote a piece in which he attacked me for the book. But, by that time, more important things were happening.

The scheme of legislation underlying the Weimar system of labour law was that trade unions and employers' associations would remain independent, independent to the point where it was part of their essence to be prepared, even if sparingly and as a last resort, to have recourse to hostile action. Both the freedom to strike and the freedom to lock out were absolutely part of the scheme of Weimar labour law as I understood it, and as I think one must understand it. What I said in my little book on

the *Reich* Labour Court was that the Court was distorting or falsifying this system of 'pluralism' into a system of 'corporatism'. By 'corporatism' I don't mean just increased state intervention, that isn't the point. The point is that, under fascism, the 'corporations' on the two sides, the collective entities, are no longer organisations making their own decisions, forming their own will (as one says in German), representing a power in themselves: on the contrary, they become a part of a power that embraces them, and on which they depend.

This becomes clearest, perhaps, in the section of the book where I deal with the works council. Under the law of 1920, as under the present legislation in West Germany, the works council is seen as an independent representative of workers' interests in the enterprise or in the plant. But, at the same time, the works council in the Weimar Republic had an economic policy function, it had to co-operate with the employer for the purposes of the plant, the *Betriebszweck*. This aspect of co-determination became completely shadowy, almost a dead letter. But the Courts said that the works councils were organs of the plant and must therefore do nothing against the interests of the plant, which was then indistinguishable from the interests of the employer. This is a concrete example of the perversion of pluralism into corporatism. In this respect, my views have not changed since the 1930s[9].

All this can really only be understood in the context of the deflationist policies of the Brüning government. The unspoken, unarticulated premise of Brüning's policy was to improve the export situation by a constant reduction in the wage levels. In fact, this comes out much more clearly in the second article, which was published in the *Archiv für Sozialwissenschaft*, a journal of very high standing, the leading sociological publication in Germany. Of course, this didn't reach the kind of public a book would reach, and also it was published at a time when everything was in a state of dissolution. The article was written under the impact of the Emergency Decrees of the Brüning government, which had breached the wall of the compulsory nature of the substantive terms of collective agreements. It was written almost in terms of an obituary notice.

Biographical and Intellectual Development after 1933

Emigration to England and the Contrast with Weimar Germany

My wife and I left Germany for political reasons: it wasn't necessary to leave Germany at that time because I was a Jew.

Consider the situation of two still fairly young people moving from

the Germany to the England of 1933. Can you understand the admiration we felt for the civilized way things were conducted here? The absence of that element of fear, especially fear of the 'State' and everyone that wears a uniform or a peaked cap, the presence of an ability to discuss and not shout, the omnipresent signs of an inherited political and social culture in which everyone participated, including the workers in the unions and the Workers' Educational Association (with which I became closely connected very soon), and which resulted from something I had thus far only been able to despise: tradition.

The most important things are seen either through the microscope or the telescope – the latter is more important here. We saw England during the first few years here still through the telescope of the immigrant. But there was mass unemployment, there was an obtuseness (quite generally, in all classes) as regards international affairs, which drove people like us up the pole.

You cannot have had any difficulty in seeing that what I said in my introduction to Sinzheimer's selected writings, that he derived his main inspiration from the experiences of his youth, was also meant to apply to myself. In whatever I was able to do in this country I was a 'bridge-builder'. Every thinking immigrant is in charge of a business of intellectual import, wholesale, often retail. However, if he is only that and no more, then he belongs to a category of immigrants or refugees whom at one time in the 1930s the French nicknamed *les Bei-Uns* – that is, those people whose every sentence began with the words: 'But *bei uns* [in our country, in Germany] it was like this, that and the other'. The attempt to legalise the class struggle in a capitalist system was, for me, in a sense, a *bei uns* element.

My views changed chiefly after 1945, not in the thirties. This change can be seen in purely biographical terms: I was getting older. Moreover, despite the strong influence of Marx on my thinking, I could never be a true Marxist because I considered the doctrine of the 'withering away of the State', of the substitution of the administration of things for the domination over persons, as one of the pillars of Marxism, and as an anarchist-utopian part of it which must do service as a substitute for a constructive theory. This was already my view when I was an undergraduate. In this respect, there is no change.

But here in England, under the influence of a very different kind of social structure, I began to be assailed by doubts regarding the existence of such a thing as a 'working class', by doubts, above all, concerning the Marxist polarisation hypothesis (the doctrine of immiseration), by doubts, further, about the socialist 'left' which perished in Germany because it could never make up its mind whether or not it

wanted a revolution, and which suffers from the same disability here, that is, in an environment in which the mere thought that the so-called 'working class' wants a 'revolution' is self-defeating.

Consider also that the advent of a real Labour government under Attlee in 1945, a government which promptly proceeded to doing the very things no government in the Weimar Republic had even looked at – nationalisation of coal and later steel, the National Health Service etc. – was for me a formative experience. And it was also a formative experience or perhaps a traumatic experience, that, for example, in the mining industry, the substitution of a public for a private employer did not touch the core of labour relations.

Gradually, my previous quasi-Marxist conviction that the tension between capital and labour was a characteristic of the control of the means of production by private owners faded and gave way to a conviction that it is inherent in any kind of industrial society, however strong or weak its elements of public or private ownership or control. This is a problem Sinzheimer never faced: he lived in a world in which it did not exist. He was not of course a Marxist either, but this is not the point here. I think I have expressed this fairly clearly in *Labour and the Law*. Of course, this is different from my approach in *The Social Ideal of the Reich Labour Court* which I wrote forty years ago, or in the (in my opinion much better) article on the *Changing Function of Labour Law*, which I wrote a year or two later.

I mention all this to say two things: it is, if you like, a kind of *apologia pro vita mea*. Have I betrayed my own youth? I think not. I should have been blind and deaf if I had not adjusted the ideas I imported from abroad to my new environment, not consciously, but automatically, instinctively. How could I overlook that the sphere of the 'noncontroversial' was so much larger here than in Germany. But neither, I hope, have I ever been one of those idolators of the country of refuge who do it no favour and are the opposite numbers of the *Bei-Uns*.

'You Do Not Swim a Second Time in the Same River'

After we left Germany, I became completely immersed in English things. For me, Weimar Germany was a world that had vanished. I felt no sense of continuity with the Federal Republic, even when I was told that the proposals for reform contained in my doctoral thesis were being incorporated into the new Federal labour law.[10] There is one thing that I have made a cast-iron principle, that in this life I shall never again interfere with anything German. I can talk about the past, but not about the present or the future. I won't say anything about the Federal Republic, except in purely technical terms; I can say the law is now

this or that. But about the attitudes, the actual struggles inside West Germany, no.

Did I consider going back after the War? I'll answer with Goethe: 'In demselben Flusse/Schwimmst du nicht zum zweitenmal' ('You do not swim a second time in the same river').[11] It won't do. Whatever I say about present conditions in Germany is conditioned by my own past and by the impossibility of seeing things in Germany today in the same way in which I could see things in another country. The past is too strong, the emotional influence of the past is too strong. I'm expressing it very badly because perhaps I'm not quite clear about it myself. It's an instinct which perhaps I've never fully articulated. I've never been able to understand those colleagues of mine who returned after 1945, such as my closest friend Ernst Fraenkel; he and I were completely different in that respect. He could do it, but then, of course, his experience was different from mine.

General Reflections on Labour Relations, Politics and the State

I have been asking myself, what is the 'state', what does it represent? This is the *Gretchenfrage*,[12] the critical question.

If you talk in German terms and in the German atmosphere, whether it's at the time of the Kaiser, during the Weimar Republic or in the Federal Republic, the state, the *Staat*, is given. It is a fact, like the speed of light in nature. This goes back to Hegel. I remember that, not long after the War, a group of Germans came to this country, trade unionists, employers and civil servants, and I gave a talk to them. And I said: 'The first thing you have to understand if you want to understand England is that Hegel was not an Englishman'. The *Staat*, I have to use the German word, was something that was just there, it represented the postulated common interest. I don't suppose that, at the time when I wrote those two articles, I was sufficiently detached to question this. This approach towards the role of the state was deeply rooted in the German labour movement: it should not be forgotten that the influence of the state-socialist Ferdinand Lassalle on the German Social Democratic Party was fundamentally much greater than that of Marx.

Sinzheimer took the economic constitution (Article 165 of the Weimar Constitution) very seriously, this idea of a pyramid structure, with the National Economic Council on top, and going down via the area councils to the works councils. Of course, I came into all this after the Article had been drafted, and I always read paragraphs 2, 3, 4 and 5 of Article 165 a little bit the way one reads *Alice in Wonderland*.

However, Sinzheimer never took the view that these organs would be ultimate decision-making bodies. They were to be subordinate to the political sphere, only consultative and therefore innocuous. They would be consulted on all matters concerning the economy, but not on questions of foreign policy and other non-economic matters. There, the state would be autonomous. It was an essential part of the views of all of us belonging to this group [that is, the group of social democratic labour lawyers who had been taught by Sinzheimer, including Kahn-Freund, Franz Neumann and Ernst Fraenkel] that there was an autonomous political sphere in which decisions would have to be made by political organs, that is to say, by a democratically elected parliament, and by a government, supposed to depend on parliament and giving orders to a civil service. We were very naive in that respect, I know that in 1979: I didn't know it in 1929. We really thought there was a parliamentary democracy, that parliament would lay down the policy, which the government would then carry into effect, and that the civil service would faithfully carry out the orders given to them by the Ministers who were responsible to parliament. We took that *au pied de la lettre*. Don't forget that this was the great achievement of the Weimar Republic, of the so-called Revolution of 1918, compared with the period of Bismarck and the Kaiser.

We also held the naive belief that the Weimar Constitution, with its elaborate and very complicated scheme of political decision-making, was the ultimate, not only as an ideology, an idea or a plan, but as a reality: it was postulated to be a reality. I think I'm probably right in saying that, of all of us, the one who was nearest to an insight into the naivetë of this view was Franz Neumann, who was really clever, much cleverer than the rest of us; there was a romantic element in Ernst Fraenkel which was completely absent in Neumann.

I am coming increasingly to the conclusion, outrageous from the Marxist point of view, that what the state represents is the consumer: in intention, not in actuality. This is not a sufficient definition, it's only a part of something much bigger, namely that there is, over and above the class conflict between capital and labour (or, as I prefer to call it, management and labour), a vast area where their interests are in common, and the state is the embodiment, the incorporation from the centre, of these common interests. (This is the most strictly non-Marxist approach to the problem that there is.) This means that there is a sphere above class conflict, for instance, in areas such as public health, education, the conduct of foreign affairs and, speaking realistically, the maintenance of defence.

If you go back to the days of the Weimar Republic, and if you had taken the whole group of us who were arguing about these things at the time, not even those who were furthest to the left would have denied this. They would have said, of course, that, in a class society like ours, in capitalism, there is a constant distortion of the common interest, and the civil service is attracted to the capitalist side. Perhaps it would not have been formulated like this, maybe it would have been formulated even more strongly. But the existence of common interests would hardly have been denied by anybody, even those who were most strongly influenced by Marxism. The common interest existed, but it wasn't carried into effect: inevitably, in reality, the best we can achieve is an approximation. Of course there will always be conflicting interests, I insist on that. A society without conflicting interests is a utopia, there is no society without conflicting interests. Therefore the realisation of common interests must always take place in the form of the maximum possible reconciliation. The consumer interest is only part of the common interest, but it happens to be an interest that all have in common. Of course, the consumption element of daily life, the satisfaction of daily needs, plays a much bigger role for those who have little than for those who have much, and therefore the conflict of interest comes in again. But basically, this is a common interest.

I don't think that, at the time, the discussion ever reached this level. The question: what is the state for, how far is there a common interest, was not answered. However, there was one man who said something at the time which made an immense impression on me. He was called Richard Joachim, a Jew who was later killed by the Nazis. He was on the left wing of the SPD and was a very high official in the *Reich* Ministry of Labour. I want to mention it to show that this point of view was represented. He said that those who regard the famous Article 165 of the Weimar Constitution as an end point are fascists. Only those who regard it as a point of transition (*Durchgangspunkt*) are democrats and socialists. What he was saying, and as I see things at present I no longer agree with him, was that pluralism is only a transition to something else. He said, in present day terms, that pluralism considered as a final state of affairs is no longer distinguishable from what is often called corporatism.

We all felt, probably without even realising it, not very easy about this. But we were all of us so much involved in these burning, day-to-day questions that we simply didn't have the time, the peace of mind and the detachment to face these problems.

Notes

1. This postscript is made up of an edited version of the transcript of an extended interview with Kahn-Freund (19 April 1979) and excerpts from one of his letters to the editors (16 January 1979). The sub-headings and notes are our own.
2. E.H. Phelps Brown, *The Growth of British Industrial Relations* (Macmillans, 1959). The photographs are reproduced facing page 42.
3. 'The proletarians have nothing to lose but their chains. They have a world to win', *Karl Marx: Selected Works* (Lawrence & Wishart, 1942), Vol. 1, p. 241.
4. The references for Sinzheimer's writings are listed in Appendix 1. For further discussion by Kahn-Freund of these two books, see 'Hugo Sinzheimer 1875–1945', pp. 73ff.
5. A. Flanders, 'Collective Bargaining: A Theoretical Analysis', *British Journal of Industrial Relations*, 6 (1968) 1, reprinted in A. Flanders, *Management and Unions* (Faber & Faber, 1970), pp. 213–40. Contrast Alan Fox, 'Collective Bargaining, Flanders and the Webbs', *British Journal of Industrial Relations*, 13 (1975) 151.
6. S. and B. Webb, *Industrial Democracy* (Longmans, 1897) was first translated into German by C. Hugo and published in 1898; their *History of Trade Unionism* (Longmans, 1894) was first published in German translation in 1895.
7. The seventh chapter of Weber's *Economy and Society* was entitled 'Sociology of Law'. This chapter, plus other sections of *Economy and Society* relating to the sociology of law, have been translated into English by Edward Shils and Max Rheinstein and published in one volume: Max Rheinstein (ed.), *Max Weber on Law in Economy and Society* (Harvard University Press, 1954).
8. See Appendix 5 for the correspondence between Nörpel and Kahn-Freund. It is also discussed in Martiny (1976), pp. 133–41.
9. Kahn-Freund is here using the term 'corporatism' in much the same sense as he used the concept of 'fascism' in *The Social Ideal of the Reich Labour Court*. The equation of corporatism with fascism was not uncommon in the 1930s, not only in Germany, but also in Britain: see B. Pimlott, *Labour and the Left in the 1930s* (Cambridge University Press, 1977), pp. 63–7. However, W. Milne-Bailey, Head of the TUC's Research and Economic Department in the 1930s, used the concept in quite a different way, advocating a new role for trade unions in industrial and economic management in terms of a synthesis of 'pluralism' and 'corporatism': Milne-Bailey (1934). This idea was perhaps echoed in the 1970s by the conceptualisation of the 'Social Contract' between the Labour government and the TUC as 'bargained corporatism': see C. Crouch, *Class Conflict and the Industrial Relations Crisis* (Heinemann, 1977), esp. pp. 262–72.
10. For details of Kahn-Freund's doctoral thesis, see bibliography. His proposals for reform of the law were incorporated in the Statute on Collective Agreements of 1949 (cf. T. Ramm, 'German Labour Law and Otto Kahn-Freund' (1971), p. 4).

11. This is part of a poem by Goethe called *Dauer im Wechsel* (*Constancy in Change*), written in 1803 and first published in 1804: Johann Wolfgang von Goethe, *Berliner Ausgabe, Band 1, Gedichte* (*Berlin Edition*, Vol. 1, *Poems*) (Aufbau Verlag, 1972), p. 84.
12. In Part I of Goethe's drama, *Faust*, the title character attempts to seduce a young religious girl called Gretchen. She is only prepared to sleep with Faust if she is also at one with him spiritually, and so she asks him what is for her the crucial question: '*Glaubst du an Gott*?' ('Do you believe in God?') (Goethe, *Faust*, Part I (Macmillan, 1957), p. 158). Thus the 'Gretchen question' ('*Gretchenfrage*') has come to mean the final, ultimate, decisive question.

Appendices

APPENDIX 1

Bibliography of the Writings of Hugo Sinzheimer

(i) Major writings

The Collective Agreement (*Der korporative Arbeitsnormenvertrag*), Vol. 1 (Leipzig, 1907), Vol. 2 (Leipzig, 1908).

A Statute on Collective Agreements: The Idea of Social Self-Determination in the Law (*Ein Arbeitstarifgesetz: Die Idee der sozialen Selbstbestimmung im Recht*) (Münich & Leipzig, 1916).

Basic Outlines of Labour Law (*Grundzüge des Arbeitsrechts*) 1st edition (Jena, 1921), 2nd extended and completely revised edition (Jena, 1927).

The Task of the Sociology of Law (*De taak der rechtssociologie*) (Haarlem, 1935).

Classical Jewish Scholars of German Jurisprudence (*Jüdische Klassiker der deutschen Rechtswissenschaft*) (Amsterdam, 1938), reprinted with an introduction by Franz Böhm (Frankfurt/Main, 1953).

Theory of Legislation. The Idea of Evolution in the Law (*Theorie der Gesetzgebung. Die Idee der Evolution im Recht*), published posthumously (Haarlem, 1949).

(ii) Selected shorter writings and speeches

All the shorter writings and speeches mentioned by Otto Kahn-Freund in his essay, 'Hugo Sinzheimer 1875–1945', are cited below. They are listed chronologically. All these texts were reprinted in the two-volume edition of Sinzheimer's collected essays and speeches, published under the title of *Labour Law and the Sociology of Law* in 1976, introduced by Otto Kahn-Freund and edited by Otto Kahn-Freund and Thilo Ramm (Hugo Sinzheimer, *Arbeitsrecht und Rechtssoziologie. Gesammelte Aufsätze und Reden* (Frankfurt-Cologne, 1976). After the

original source of each text has been cited, we shall refer in brackets to the volume and page numbers in the 1976 edition in which each text has been reprinted. For example, the first text which appears as (2, 3–23) appears in Volume 2, pages 3 to 23.

(1909) 'The Sociological Method in the Discipline of Private Law' (Die soziologische Methode in der Privatrechtswissenschaft'). Lecture given to the Social Science Society of the University of Münich, 24/5/1909 (Münich). (2, 3–23)

(1914a) 'On the Basic Idea and the Possibility of a Unified Labour Law for Germany ('Über den Grundgedanken und die Möglichkeit eines einheitlichen Arbeitsrechts für Deutschland'), *Schriften des Verbandes deutscher Gewerbe- und Kaufmannsgerichte*, Vol. 1 (Berlin). (1, 35–61)

(1914b) 'The Will to the Formation of Law' ('Der Wille zur Rechtsgestaltung'), *Die Tat*, VI (1914/15) 375–85. (2, 24–32)

(1915a) 'The Politician Karl Flesch: Social Policy and Literary-Academic Activity' ('Der Sozialpolitiker Karl Flesch und seine literarisch-wissenschaftliche Tätigkeit'). Lecture given to the Committee for Adult Eduction Lectures in Frankfurt/Main (Frankfurt/Main). (1, 378–87)

(1915b) 'On the 70th Birthday of Lujo Brentano' ('Zum 70. Geburtstag Lujo Brentanos'), *Arbeitsrecht*, 2 (1915) 175–6. (1, 375–7)

(1915c) Review of Fr. Klein, *Organisations in the Contemporary World* (*Das Organisationswesen der Gegenwart*) (Berlin, 1913), *Arbeitsrecht*, 2 (1915) 239–43. (1, 388–94)

(1915d) 'The Idea of Collective Bargaining in Germany' ('Der Tarifgedanke in Deutschland'), *Annalen für soziale Politik und Gesetzgebung*, 3 (1915) 531–56. (1, 150–68)

(1916) 'Unified Organisation for Employees?' ('Einheitliche Arbeitnehmerorganisation?'), *Arbeitsrecht*, 3 (1916) 123–6. (1, 169–72)

(1919a) 'The New Ordering of Labour Law' ('Die Neuordnung des Arbeitsrechts'), *Juristische Wochenschrift*, 48 (1919) 465–8. (1, 62–9)

(1919b) 'The Essence and Significance of Rights of Association' ('Wesen und Bedeutung des Koalitionsrechts'). Part of an essay published in *Annalen für soziale Politik und Gesetzgebung*, 6 (1919) 13–16. (1, 173–5)

(1919c) 'On the Forms and Significance of the Works Councils' ('Über die Formen und Bedeutung der Betriebsräte'), *Die Gleichheit*, 29 (1918/19) 193–4. (1, 321–4)

(1919d) 'The Future of the Workers' Councils: A Question of Social Democracy' ('Die Zukunft der Arbeiterräte. Eine Frage der sozialen Demokratie'), *Neue Wege zum Aufbau Deutschlands*. 1st Supplement to the monthly journal *Die Tat*, (1919) 3–8. (1, 351–5)

(1919e) 'The Councils' System' ('Das Rätesystem'). Two introductory lectures on the idea of the councils (Frankfurt/Main). (1, 325–50)

(1921) 'Draft of a Statute on Collective Agreements' ('Entwurf eines Arbeitstarifgesetzes'), *Reichsarbeitsblatt*, Amtlicher Teil, p. 491. (1, 182–204)

(1922a) 'Philipp Lotmar and the Discipline of Labour Law in Germany' ('Philipp Lotmar und die deutsche Arbeitsrechtswissenschaft'), *Arbeitsrecht*, 9 (1922) 587–600. (1, 408–15)

(1922b) 'Advocates and Labour Law' ('Anwaltschaft und Arbeitsrecht'), *Juristische Wochenschrift*, 51 (1922) 538–41. (1, 70–7)

(1922c) 'The Further Development of Labour Law'. Key Principles of the Address to the 1st Congress of the Federation of Salaried Employees ('Die Fortbildung des Arbeitsrechts'. Leitsätze zum Referat auf dem ersten AfA.–Gewerkschaftskongress), *Arbeitsrecht*, 9 (1922) Columns 178–180. The full lecture was published as a brochure in 1922. (1, 78–90)

(1922d) 'Otto Gierke's Significance for Labour Law'. An Obituary ('Otto Gierkes Bedeutung für das Arbeitsrecht'. Ein Nachruf), *Arbeitsrecht*, 9 (1922) Columns 1–6. (1, 402–7)

(1922e) 'On the Sociological and Positivistic Method in the Discipline of Labour Law' ('Über soziologische und dogmatische Methode in der Arbeitsrechtswissenschaft'), *Arbeitsrecht*, 9 (1922) Columns 187–98. (2, 33–41)

(1923) Review of Kaskel, *On the Theory of the Breach of Collective Agreements* (*Zur Lehre vom Tarifbruch*), *Juristische Wochenschrift*, 52 (1923) 218. (1, 205–6)

(1924a) 'On the 70th Birthday of Franz Klein' ('Franz Klein zu seinem siebzigsten Geburtstag'), *Arbeitsrecht*, 11 (1924) Columns 645–58. (1, 395–401)

(1924b) 'Cessation of Demand and the Contract of Employment: A Contribution to the Theory of Works Risk' ('Absatzstockung und Arbeitsvertrag. Ein Beitrag zur Lehre vom Betriebsrisiko'), *Arbeitsrecht*, 11 (1924) Columns 473–88. (1, 207–15)

(1924c) 'The Struggle for the New Labour Law' ('Der Kampf um das neue Arbeitsrecht') *Die Arbeit*, 1 (1924) 65–73. (1, 91–9)

(1924d) 'The Central Problem of the Reform of Collective Bargaining Law' ('Das Kernproblem der Tarifrechtsreform'), *Juristische Wochenschrift*, 53 (1924) 1008–10. (1, 216–20)

(1925) 'Europe and the Idea of Economic Democracy' ('Europa und die Idee der wirtschaftlichen Demokratie') *Europas Volkswirtschaft in Wort und Bild*, ed. by *Frankfurter Zeitung* (1925/26) XVII–XVIII. (1, 221–5)

(1927a) 'Labour Law and the Labour Movement' ('Arbeitsrecht und Arbeiterbewegung'). Address to the 15th Congress of the German Association of Woodworkers, held from 12–18 June 1927 in Frankfurt/Main (Berlin). (1, 100–7)

(1927b) 'The Essence of Labour Law' ('Das Wesen des Arbeitsrechts'), in G. Hermes (ed.), *Grundfragen des Arbeitsrechts* (Berlin), pp. 4–9. (1, 108–14)

(1928a) 'The Change in the World View of the Lawyer' ('Der Wandel im Weltbild des Juristen'), *Zeitschrift für soziales Recht*, 1 (1928/29) 2–6. (1, 42–50)

(1928b) 'The Democratisation of the Employment Relationship: From the Law of Things via the Law of Obligations to the Law of Labour' ('Die Demokratisierung des Arbeitsverhältnisses: Vom Sachenrecht über das Schuldrecht zum Arbeitsrecht'). Unattributed 3rd chapter in F. Naphtali (ed.), *Wirtschaftsdemokratie. Ihr Wesen, Weg und Ziel* (Berlin), pp. 127–54. 1, 115–34). This book was commissioned by the socialist trade union confederation for manual workers, the ADGB.

(1929a) 'On Some Basic Questions of the Law of Collective Bargaining: A Critical Review of the Basic Theories of Erwin Jacobi' (Über einige Grundfragen des Arbeitstarifrechts. Eine Auseinandersetzung mit den Grundlehren Erwin Jacobis'), *Die Reichsgerichtspraxis im deutschen Rechtsleben*, Vol. 4 (Berlin and Leipzig), pp. 1–16. (1, 255–72)

(1929b) 'On the Question of the Reform of the Arbitration System' ('Zur Frage der Reform des Schlichtungswesens'), *Reichsarbeitsblatt*, Part II, p. 149–53. (1, 226–35)

(1929c) 'The *Reich* Labour Court on the Question of Works Risk' ('Das Reichsarbeitsgericht zum Betriebsrisiko'), *Arbeitsrecht*, 16 (1929) Columns 223–7. (1, 273–5)

(1930a) 'The Reform of the Arbitration System' ('Die Reform des Schlichtungswesens'). Speech summing up the proceedings of the 11th General Assembly of the Society for Social Reform, held 24–25 October 1929 in Mannheim. Published in the

Report of the Proceedings (*Bericht über die Verhandlungen der XI. Generalversammlung der Gesellschaft für Soziale Reform*) (Jena), pp. 17–49. (1, 236–54)

(1930b) 'The Legal Status of the Bremen Chambers of Employees: A Contribution to the Construction of the Councils' System and the Scope of Rights of Association (Articles 165, 159 of the *Reich* Constitution)' ('Die Rechtsgültigkeit der bremischen Arbeitnehmerkammern: Ein Beitrag zum Aufbau des Rätesystems und Umfang des Koalitionsrechts (Art. 165, 159 *RV*)'), *Neue Zeitschrift für Arbeitsrecht*, 10 (1930) Columns 593–608. (1, 293–306)

(1930c) 'The Significance of the Trade Unions in the New Labour Law' ('Die Bedeutung der Gewerkschaften im neuen Arbeitsrecht'), *Jahrbuch für Sozialpolitik*, Vol. 1, pp. 58–66. (1, 286–92)

(1930d) 'The Obligation of the Employer to Disclose Information' ('Die Auskunftspflicht des Arbeitgebers'), *Deutsche Techniker-Zeitung*, 12 (1930), *Supplement on Law*, 10 (1930) 25–8. (1, 276–85)

(1930e) 'Towards a Criticism of Bourgeois Law' ('Zur Kritik des bürgerlichen Rechts' (A Review of Renner's *The Institutions of Private Law*), *Zeitschrift für Soziales Recht*, 2 (1929/30) 93–7. (1, 416–22)

(1930f) 'The Human Being in Labour Law' ('Der Mensch im Arbeitsrecht'), *Neue Blätter für den Sozialismus*, 1 (1930) 241–4, also *Juristische Wochenschrift*, 59 (1930) 3078–9. (2, 50–2)

(1932) Review of H.D. Müller, 'What is the Relation between Section 950 of the Civil Code and the Proposition that Every Worker Should Own the Product of his Labour? (1930) 'Wie verhält sich der Paragraph 950 *BGB* zu dem Satz, daß jeder Arbeiter Eigentümer des Arbeitsproduktes werden soll?' (1930)), *Juristische Wochenschrift*, 61 (1930) 2597–8. (1, 423–6)

(1933a) The Problem of the Human Being in the Law' ('Das Problem des Menschen im Recht'). Lecture given by Sinzheimer on the acceptance of a professorship in the sociology of law at the University of Amsterdam, 6 November 1933 (Groningen). (2, 53–69)

(1933b) 'The Crisis of Labour Law' ('Die Krisis des Arbeitsrechts'). Essay on the 20th Anniversary of the founding of the journal *Arbeitsrecht*. *Arbeitsrecht*, 20 (1933) Columns 1–10. (1, 135–41)

(1934a) 'The Theory of the Sources of Law and Labour Law' ('La théorie des sources du droit et le droit ouvrier'), *Annuaire de*

l'Institut International de Philosophie et de Sociologie juridique, 1934 73–9. (2, 79–84)

(1934b) Review of Diepenhorst, *Property* (*De eigendom*), *Mens en Maatschappij*, 12 (1934) 64–5. (1, 427–9)

(1935a) 'A Theory of Social Law' ('Een theorie van het sociale recht'). A review of G. Gurvitch, *L'idée du Droit social* (Paris, 1932), *Mens en Maatschappij*, 11 (1935) 322–36, 414–28. Also translated into German, 'Eine Theorie des sozialen Rechts', *Zeitschrift für öffentliches Recht*, XVI (1936) 31–57. (2, 164–87)

(1935b) 'A New Theory of the State' ('Een nieuwe staatsleer'). A review of H. Heller, *Staatslehre* (1934), *De Socialistische Gids*, 20 (1935) 420–6. (1, 430–5)

(1936a) 'The Background of Labour Law' ('De achtergrond van het arbeidsrecht'). Lecture given at Sinzheimer's acceptance of a professorship at the University of Leiden, 14 February 1936 (Haarlem). (2, 149–63).

(1936b) 'The Trade Union Movement and the Collective Idea' ('De Vakbeweging en corporatieve Gedachten'), in *De Vakbeweging in de Economische Opbouw* (Amsterdam), pp. 5–20. (1, 307–18)

(1937) 'The Young Marx and the Sociology of Law' ('De jonge Marx en de sociologie van het recht'), *Socialistische Gids*, 22 (1937) 1–11, 117–26. (2, 188–206)

(1938) 'The Transformation Problem in the Sociology of Law', in *Strijdenskracht door Wetensmacht*. Opstellen aangeboden aan S. de Wolff ter gelegenheid van zijn 60er verjaardag (Amsterdam), pp. 45–59. (2, 207–18)

(1939) 'On Formalism in the Philosophy of Law'. A Reflection on the Death of Rudolf Stammler (Part 1), *Zeitschrift für freie deutsche Forschung* (Paris), 2 (1939) 30–40. (2, 219–44)

APPENDIX 2

The Legal Framework of Labour Relations in Germany until 1933
A Summary of the Major Regulations and Statutes

AGG (1926) — *Arbeitsgerichtsgesetz* (Law of Labour Tribunals)
This law established 'unified' labour tribunals to settle disputes between individual workers and employers, abolishing the separate industrial (for manual workers) and commercial (for salaried employees) tribunals which had existed since 1890 (*GewGG*, q.v.) and 1904 (*KGG*, q.v.). The operation of the system of labour tribunals is discussed in detail above, p. 34ff.

AufsRatG (1922) — *Gesetz über die Entsendung von Betriebsratsmitgliedern in den Aufsichtsrat* (Law on the Representation of Works Council Members on the Supervisory Board)
Under this law, employees had the right to send up to two representatives, elected by the works council by secret ballot, to the board of enterprises which, under company law, were required to have a supervisory board. They were to have equal rights and duties as other members of the supervisory board, except that they received no remuneration (only expenses) and their period on the board was limited to their period of membership in their electoral college (i.e. the works council). This law had very little effect during the Weimar Republic. Works councillors distrusted the system and often refused to take up their right of representation, and when they did, shareholders' representatives regularly dealt with sensitive questions outside the framework of the supervisory board, either by

establishing sub-committees without employee participation or by delegating powers to the management board. However, after 1945, employee representation at board level was expanded to become part of the multi-level system of co-determination which exists today in West Germany.

AVAVG (1927) *Gesetz über Arbeitsvermittlung und Arbeitslosenversicherung* (Employment Service and Unemployment Insurance Law)
This law replaced means-tested unemployment welfare payments by a general system of insurance which gave unemployed workers a statutory right to unemployment benefit for up to 26 weeks. An insurance fund was also established by a 3% tax on wages, to which employers and employees contributed an equal share. It was created to provide for no more than a maximum of 1.1 million workers, and virtually collapsed after 1930. This law also instituted an integrated system of labour exchanges at local, state and *Reich* level, which was administered together with the unemployment insurance scheme by a newly created *Reich* Institute for the Employment Service and Unemployment Insurance.

AVG (1911) *Angestelltenversicherungsgesetz* (Law on Insurance for Salaried Employees)
Introduced in the same year as the *Reich* Insurance Order (*RVO*, q.v.), this law created a separate system of social insurance (covering illness, injury or disability) for salaried employees. It served to reinforce the ideological and status divisions between white-collar and manual workers. Section 1 gave a much quoted definition of those occupational groups who could be classified as 'salaried employees' (*Angestellte*). These included clerical, technical and administrative employees, domestic employees with supervisory functions, executive and supervisory staffs. This list of occupations was regularly cited in relation to other areas of employment law, e.g. in claims for separate representation in works councils.

AZVO (1923) *Verordnung über die Arbeitszeit* (Decree on Working Time)
This Decree, which generally restricted the working day to eight hours, was first issued by the government in 1918–19

as a provisional measure for the period of demobilisation after the war. It was regularly renewed until 1923, when, at the height of the economic and political crisis, a number of escape clauses were added, allowing for a much greater number of exceptions. These escape clauses were subsequently modified by amendments introduced in 1927. By this time, the eight-hour-day had been re-established in a number of industries through collective agreements between trade unions and employers' associations.

BGB (1896) *Bürgerliches Gesetzbuch* (Civil Code)
This Code, which came into operation on 1 January 1900, was an attempt to restate the fundamental principles of German private law (e.g. contract, property). It was left largely untouched by Weimar legislation, although the archaic domestic and agricultural service laws (*Gesindeordnungen*, q.v.) were finally abolished by the Council of People's Representatives on 12 November 1918.

BRG (1920) *Betriebsrätegesetz* (Law of Works Councils)
Workers' committees performing functions similar to those of the later works councils were first permitted by law in large firms in 1891 and were developed systematically in the Prussian mining industry from 1905. However it was the Auxiliary Service Law (*HDG*, q.v.) of 1916 which first encouraged the more general institution of workers' and salaried employees' committees (*Arbeiter- und Angestelltenausschüsse*) in firms engaged in war service with more than 50 employees. In December1918, a government decree was issued which made such committees obligatory in all establishments with over 20 employees.

The Law of February 1920 provided for the establishment of works councils with a dual function. Their social policy function was to represent and promote the common interests of all employees; their economic policy function was to support the employer in the fulfillment of the 'works objective' (*Betriebszweck*). Election to the works council was by secret ballot, conducted separately for manual workers and salaried employees according to proportional representation. The special interests of the two main occupational groups were to be represented by separate

'group councils' (*Gruppenräte*), a workers' council (*Arbeiterrat*) and a salaried employees' council (*Angestelltenrat*), which had special rights in cases of dismissal. Initially, both trade union leaders and radical (USPD and KPD) workers were suspicious of the new law, union leaders because they feared the works councils would undermine the union bargaining role and left-wing groups because they resented what they regarded as the emasculation of the political and wider economic role of the councils. In the event, the trade unions had little to fear from the works councils. The practice was soon established that the local trade unions drew up a unified list of candidates for the works council elections, and that no union member should be allowed to stand as a candidate on a rival slate. For a more detailed discussion of the relation between the trade unions and the works councils, see above pp. 24–7, 32–5.

GesO — *Gesindeordnungen* (Domestic and Agricultural Service Codes)
These Codes, which existed at *Länder* level before 1918, were the equivalent of the Industrial Code (*GewO*, q.v.) for domestic and agricultural workers. They were finally abolished in November 1918, but agricultural workers still continued to be covered by separate legislation as regards accidents, insurance, and contracts of employment.

GewGG (1890) — *Gewerbegerichtsgesetz* (Law of Industrial Tribunals)
Under this law, separate tribunals were established at local level to deal with industrial grievances relating to manual workers. The tribunals were administered by local government bodies, and included lay representatives of employers and employees. They developed in some cases additional arbitration and conciliation functions, but before 1914, trade unions amd employers' associations often preferred to establish their own 'voluntary' arbitration and conciliation procedures. This law was superseded by the Law of Labour Tribunals of 1926 (*AGG*, q.v.).

GewO (1869) — *Gewerbeordnung* (Industrial Code)
This Code replaced the fragmented employment regulations in the various German states which made up the newly constituted North German Confederation. After 1871, it

applied to all manual workers in the German *Reich*. It granted, for the first time, a limited form of freedom of association and a limit on hours of work for manual workers in industry. Later amendments provided for factory inspection and protection for women workers. The *GewO* was the main codification of 'labour law' in Germany before 1918. Many of its provisions were altered or repealed in the post-1918 period.

HDG (1916) — *Hilfsdienstgesetz* (Auxiliary Service Law)
This Law provided for the compulsory mobilisation of labour during the First World War. It also gave trade unions the right to nominate representatives to semi-public bodies (e.g. arbitration and conciliation boards) and employees the statutory right to establish workers' committees at establishment level. These committees were the fore-runners of the later works councils (q.v. *BRG*).

KGG (1904) — *Kaufmannsgerichtsgesetz* (Law of Commercial Tribunals)
This was the equivalent for salaried employees of the Law of Industrial Tribunals (*GewGG*, q.v.). It was superseded by the Law of Labour Tribunals of 1926 (*AGG*, q.v.).

KSG (1926) — *Gesetz über die Fristen für die Kündigung von Angestellten* (Law on the Period of Notice for the Dismissal of Salaried Employees)
Statutory provisions concerning the dismissal of employees were spread over a number of Acts and Codes. Under the Law of Works Councils (*BRG*, q.v.), employees were given the right of appeal against dismissal, not through the works council as such, but through group councils (*Gruppenräte*). Works councillors themselves were given special protection. Other groups of workers (e.g. disabled employees) were covered by separate legislation. In cases of plant closures, the agreement of the local administrative authorities was required.

The *KSchG* gave special protection to older salaried employees, extending minimum periods of notice according to length of employment (e.g. minimum of 3 months notice after 5 years, minimum of 6 months after 12 years), and allowing termination of employment only at the end of

calendar quarters (i.e. end of March, June, September and December).

NotVO (1930–32) *Notverordnung* (Emergency Decree)
Emergency decrees could be issued by the *Reich* President under Article 48 of the Weimar Constitution. They were used between 1930 and 1932 *inter alia* to reduce collectively agreed wage rates. Article 48 is reprinted in translation in *Appendix 3*.

RV (1871–1919) *Reichsverfassung* (*Reich* Constitution)
The *Reich* Constitution was first established in 1871 on the creation of a unified German state. It vested sovereign power in the *Reich* government, which was largely dominated by the German and Prussian Emperor and his appointed Chancellor. The Weimar Constitution of 1919 established a republican system of government in Germany.
Of particular significance for labour law were:
Article 157, which proposed the creation of a unified labour law; Article 159, which guaranteed freedom of association; and Article 165, which outlined the so-called 'economic constitution', consisting of workers councils at factory, district and national level, and 'economic councils' at district and national (*Reich*) levels. The *Reich* Economic Council was established provisionally in 1919, composed of worker and employer representatives, but it failed completely to influence government economic policy or to initiate legislation on economic issues as envisaged by Article 165. The works councils (*BRG*, q.v.) were originally but one part of a pyramid-shaped councils' system, but by the middle of the 1920s, they were the only institution to survive from the November Revolution. (Articles 1, 48, 157, 159, and 165 are reprinted in translation in Appendix 3).

RVO (1911) *Reichsversicherungsordnung* (*Reich* Insurance Order)
Social insurance was first introduced in Germany by proclamation of the Emperor on 17 November 1881. The system, supervised by self-governing bodies, covered sickness, accident and invalid insurance, and tribunals were set up to resolve disputes.

The *Reich* Insurance Order of 1911 integrated the various social insurance schemes, but included a totally separate

system for salaried employees (*AVG*, q.v.). It was amended and reissued in 1924 and 1927.

SchlVO (1923) *Verordnung über das Schlichtungswesen* (Arbitration Decree)
The Decree of October 1923 replaced the relevant sections of the Collective Agreements Decree (*TVV*, q.v.) of December 1918. Arbitration was intended to assist in the conclusion of collective agreements in cases where the parties to collective bargaining were unable to resolve a dispute by normal methods. The aim was to settle a dispute by balancing opposing interests, i.e. by administrative act rather than judicial interpretation. State-sponsored arbitration was envisaged only when no collectively agreed procedure to avoid disputes existed or when it was exhausted. State arbitration committees were chaired by officials appointed by the government, assisted by nominees from trade unions and employers' associations. The arbitration process was to be concluded where possible with the agreement of both parties, either by use of conciliation or by the making of an award which both parties agreed to accept in advance. In the final resort, the *Reich* Minister of Labour could declare an award to be binding via the 'order imposing compulsory effect' (*Verbindlicherklärung*). This procedure was introduced after pressure from the trade unions and against the strong opposition of the employers. Towards the end of the Weimar Republic, the order imposing compulsory effect was used by the government to reduce wages.

TVO (1923) *Tarifvertragsordnung* (Collective Agreements Order)

TVV (1918) *Tarifvertragsverordnung* (Collective Agreements Decree)
The full title of the Decree of December 1918 was the 'Decree on Collective Agreements, Workers' and Salaried Employees' Committees, and the Arbitration of Industrial Disputes'. The latter two areas were later superseded by the Law of Works Councils (*BRG*, q.v.) and the Arbitration Decree (*SchlVO*, q.v.) respectively. The *TVV* (subsequently incorporated in the renamed *TVO*) gave full statutory recognition to regional and national collective agreements. Until then, agreements had been concluded mainly at local level. The two most important new principles recognised in

the 1918 Decree were: the automatic compulsory normative effect of collective agreements (*Unabdingbarkeit*), whereby employers were forbidden in law to deviate by individual agreement from collectively agreed terms to the detriment of the employee; and the principle of 'extension' (*Allgemeinverbindlichkeitserklärung*), whereby the *Reich* Minister of Labour was given the power to extend the coverage of collective agreements to unorganised employers and employees. Under the *TVV*, a procedure for settling disputes arising from collective agreements was established: a state-nominated chairman was empowered to set up joint arbitration boards, but the awards of these boards could not be statutorily enforced unless agreed by both sides. This was changed under the Decree of 1923 (*SchlVO*, q.v.). The *TVV/TVO* also laid down general guidelines on a number of controversial issues which later became the subject of interpretations by the *Reich* Labour Court (e.g. the capacity to conclude collective agreements, the duty of collective organisations to maintain 'economic peace' and to induce their members to observe the terms of agreements).

APPENDIX 3

The Weimar Constitution (11 August 1919)

Article 1

The German *Reich* is a republic.
The people are the source of state power.

Article 48

If a regional state government (*Land*) does not fulfill the obligations incumbent upon it under the *Reich* Constitution or under *Reich* statutes, the *Reich* President can enforce these obligations with the help of armed force.

If public safety and order are substantially disturbed or endangered in the German *Reich*, the *Reich* President may take the requisite measures to restore public safety and order, if necessary with the help of armed force. To this end, he may temporarily annul, completely or in part, the basic rights laid down in Articles 114, 115, 117, 118, 123, 124, and 153. [These articles contained rights concerning detention in custody, invasion of privacy, control of post and telephone calls, freedom of expression, freedom to hold public meetings and demonstrations, freedom to form societies, freedom of property.]

The *Reich* President must immediately inform the *Reichstag* of all measures taken under Paragraphs 1 or 2. The measures must be revoked at the request of the *Reichstag*.

In cases of imminent danger, a regional state government can take preliminary measures for its territory of the kind outlined in Paragraph 2. The measures must be revoked at the request of the *Reich* President or of the *Reichstag*. Further details will be determined by a *Reich* statute.

Article 157

Labour power stands under the special protection of the *Reich*. The *Reich* will create a unified labour law.

Article 159

Freedom of association to maintain and improve economic and working conditions is guaranteed for everyone and for all occupations. All agreements and measures which seek to limit or impede this freedom are illegal.

Article 165

Manual workers and salaried employees are called to participate, in community with the entrepreneurs and with equal rights, in the regulation of wages and conditions of employment as well as in the overall economic development of the productive forces. Organisations of the two sides and their agreements shall be recognised.

In order to protect their social and economic interests, manual workers and salaried employees shall obtain statutory representation in factory workers' councils (*Betriebsarbeiterräte*) as well as in district workers' councils (organised according to economic areas) and in a *Reich* Workers' Council.

In order to accomplish the overall tasks of the economy and to participate in the implementation of the socialisation laws, the district workers' councils and the *Reich* Workers' Council shall come together with representatives of the entrepreneurs and other participant groups of the population in district economic councils and a *Reich* Economic Council (*Reichswirtschaftsrat*). The district economic councils and the *Reich* Economic Council must be so constituted that all important occupational groups are represented according to their economic and social significance.

Draft legislation on social and economic policy matters of fundamental significance must be submitted by the *Reich* government to the *Reich* Economic Council for its expert opinion before it is introduced in parliament. The *Reich* Economic Council has the right to propose such draft statutes itself. Even if the *Reich* government does not agree with a particular draft statute, it must still bring it before the *Reichstag* and explain its point of view. The *Reich* Economic Council has the right to nominate one of its own members to introduce draft legislation in the *Reichstag*.

Powers of control and administration can be transferred to the

workers' councils and the economic councils in the areas assigned to them. The regulation of the structure and tasks of the workers' councils and the economic councils, as well as their relationship to other self-governing bodies, is a matter reserved exclusively for the *Reich*.

APPENDIX 4

STRENGTH OF THE MAIN PARTIES IN THE REICHSTAG (1871–1932)

	1871	1878	1884	1890	1903	1912	1919	1920	May 1924	Dec. 1924	1928	1930	July 1932	Nov. 1932
National Socialist (*NSDAP*)	–	–	–	–	–	–	–	–	32	14	12	107	230	196
Conservative	57	59	78	73	54	43	–	–	–	–	–	–	–	–
Independent Conservatives	37	57	28	20	21	14	–	–	–	–	–	–	–	–
German National People's Party (*DNVP*)	–	–	–	–	–	–	44	71	95	103	78	41	37	52
National Liberals	125	99	51	42	51	45	–	–	–	–	–	–	–	–
Left Liberals (Progressives)	46	26	67	66	31		–	–	–	–	–	–	–	–
German People's Party (*DVP*)	1	3	7	10	6	42	19	65	45	51	45	30	7	11
Centre (*Zentrum*)	63	94	99	106	100	91	91[1]	64	65	69	62	68	75	70
Democratic Pary (*DDP*)	–	–	–	–	–	–	75	39	28	32	25	20	4	2
Social Democrats (*SPD*)	2	9	24	35	81	110	165	102	100	131	153	143	133	121
Independent Social Democrats[2] (*USPD*)	–	–	–	–	–	–	22	84	–	–	–	–	–	–
Communist Party (*KPD*)	–	–	–	–	–	–	–	2[3]	62	45	54	77	89	100

1 Includes the votes of the Bavarian People's Party, which subsequently put up its own candidates independently of the Centre Party.

2 In 1920 a significant section of the USPD membership left to join the Communist Party. The remaining sections of the USPD rejoined the SPD in 1922.

3 Pascal claims that the KPD had four members in the Reichstag as a result of the 1920 election, but in fact only two, Clara Zetkin and Paul Levi, won their seats as KPD candidates.

Source Roy Pascal, *The Growth of Modern Germany* (Cobbett Press, 1946), pp. 82, 126.

APPENDIX 5

Exchange of Letters between Clemens Nörpel[1] and Otto Kahn-Freund (1931)

To: *Amtsgerichtsrat* Dr. Kahn-Freund
Berlin W., Kaiser-Allee 208

18th February 1931.

Dear Comrade Kahn-Freund!

Our publishing house has been asked by the *Bensheimer* Publishing Company to read through your monograph, *The Social Ideal in Labour Law with Reference to Fascism*, and to give an opinion as to whether it is suitable for distribution among the trade unions. The publishers have for their part also asked for my opinion on this matter. After a detailed reading of your monograph, I wish to inform you herewith of the following comments:

I am on principle opposed to all overstatements, since, at least in my experience, the harm which comes from them is always greater than any possible advantage. Apart from this, I most strongly dispute the objective justification of your argumentation and your conclusions. If you really have to make such comparisons, then it would be absolutely necessary to make them comprehensively. Then you would have had to compare judicial decisions in Germany with those of Russian labour law and of Italian labour law, and not just with the latter. In addition, you would unquestionably have had to take note of the fact that labour law in Russia and Italy is a product of the form of the state in these two countries. You cannot say that about judicial decisions in Germany;

1 Clemens Nörpel was Secretary to the Federal Executive Committee of the ADGB, editor of the ADGB journal, *Arbeitsrechtpraxis* (*Labour Law in Practice*), and the leading specialist on labour law in the ADGB.

they are of a transitional nature. Now as before, there are two ways open to German labour law: it can develop backwards individualistically or forwards collectivistically.

Your presentation is especially unacceptable because it is well-known in legal circles that Mussolini took over a series of formulations almost word for word from German labour law. As a result, it is very easy to make comparisons; it is, however, quite wrong to maintain that judicial decisions in Germany are therefore fascist. In principle it is not impossible that, in particular cases, the results of purely collectivist judicial decisions could well be identical with the results of fascist judicial decisions. The extent to which your obsession with comparisons has led you to false conclusions can be shown in your approach to the system of arbitration.

Was it not such recognised authorities as Flatow, Potthoff and Sinzheimer who characterised strike law as the law of the fist, and who saw (and see) the arbitration system as the way to advance beyond this? Ultimately, all my essays on this issue start from the assumption that the arbitration system is an instrument of economic peace (*Wirtschaftsfrieden*). Moreover, not only the *Reich* Minister of Labour, but also the employers' associations and the trade unions have always either accepted or rejected the system of arbitration because, in their opinion, it always has been and always should be an instrument of economic peace. Not one of the parties involved has ever even suggested that the arbitration system should function as an aid in industrial conflict. In fact, you are completely alone in accusing, of all things, the *Reich* Labour Court of having a fascist conception of the arbitration system, when it was the very *Reich* Labour Court that, in its judgment in the Ruhr iron disupte, rejected the view that the arbitration system should serve the interests of economic peace. By rejecting any intervention in collective agreements currently in force, the *Reich* Labour Court recognised the momentary power position of one party to the industrial conflict, and indeed recognised this vis-à-vis the state. That is the opposite of fascism. I do not understand how you can maintain that the *Reich* Labour Court was fascist in this case as well. You would have been justified if the Court had allowed the arbitration authorities to intervene in collective agreements currently in force. For it is universally accepted that the freedom to take industrial action ceases if there is intervention in current agreements. Such intervention has only ever been advocated in connection with the arbitration system, which seeks to establish new terms and conditions of employment by peaceful means but is completely opposed to the use of industrial action to change the terms of agreements currently in force.

All these objections to your analysis serve to reinforce the view I have always held, that it is extremely dangerous to make forced comparisons, particularly in labour law. You may well express the sharpest criticism of the idiosyncratic judicial decisions of the *Reich* Labour Court in the framework of conditions in Germany. But to do more than this, to call them fascist, is more than dangerous, for we surely have no cause to talk of the devil in such a loud voice. Apart from this, I would personally have very strong doubts as to whether any member of the Court – i.e. the professional judiciary – has ever even read the labour laws of fascist Italy.

You are also unable to back up your ideas when it comes to particular details. To talk of the redefinition of the employment relationship in terms of public service is just such an overstatement which can only harm and not help us. What you say on page 20 about the decisions of the *Reich* Labour Court on the 'works risk' and the 'renunciation of collectively agreed wage rates', i.e. that they are unfavourable in principle, is no longer valid today. For months now, the Court has been continually extending the boundaries of the 'works risk' to be borne by the workers, and, in the same way, the Court now recognises in all cases the possibility of explicit renunciation of collectively agreed wage rates. Your detailed consideration of the decisions of the Court on welfare provision also bears little relation to the facts with which we are faced today. What is the point of the Law to Protect Older Salaried Employees against Dismissal (*KSG*) when the Court gives the broadest recognition to the unilateral introduction of short-time work for the severely disabled or for salaried employees? What is the point of this law if agreements which get round it are broadly recognised by the Court? What is the use of the basic recognition of the right of severely disabled workers to payment in case of illness if this right is subsequently declared to be revocable, so that no severely disabled worker profits from it any more? And what is the use of the fine principles on holidays, that they should involve both a right to leisure time and a right to a holiday payment, when miners, who become ill and then become invalids, are never again to be given the right to claim payment for holidays, and when, in the case of short-time working, holiday pay is calculated on the basis of pay for short-time work? Do you want to actually provoke the employers into arguing, by reference to your monograph, that the decisions of the *Reich* Labour Court are favourable to employees, while in reality they are the very opposite.

Your monograph raises once again the problem of the activity of intellectuals in the working-class movement. I respect your good will and your honourable intentions. You would serve the working class

better if you would try and first get to know how the working class feels and thinks before you try to help them. As long as you were a student, you exchanged your opinions almost exclusively with people like yourself. You then entered working life without having had the opportunity, even with the best will in the world, to really get to know the psyche of the worker, and I would dispute that this is possible through a job as chairman of a labour tribunal. You need more than that. You need to submerge yourselve silently and for some years in the masses, in order then, with that knowledge of the mass psyche and with the addition of your own knowledge and understanding, to emerge again from the masses in order to represent their interests successfully. This should be the great mission of the intellectuals, whereas in reality, despite all your good intentions, you simply cause very great harm by works such as the one I have just been reviewing.

In my opinion, you should now take action to ensure that the *Bensheimer* Publishing Company does not publish your monograph.

I have also sent a copy of this letter to comrades Sinzheimer, Flatow, Fraenkel and Neumann for their information.

With best wishes,
I am your Clemens Nörpel

Berlin-Tempelhof,
Kaiserkorso 20.

21st February 1931.

Clemens Nörpel,
Berlin S 14,
Inselstr. 6.

Dear Comrade Nörpel!

I have only just received your letter of the 18th February as it was inadvertently sent to my previous address.

First of all, I must deal with the conclusion of your letter. What you say there about the role of intellectuals in the labour movement seems to me to be completely wrong. One of the essential differences between our movement and communism is that we have no 'general line' and as a democratic movement we can't have one. The opinions which are held inside the labour movement, and particularly the ideas about what harms and what is useful to the movement, are formed after a free exchange of ideas and not prescribed by an authoritative body. In this free exchange of ideas, the intellectuals, who have come to the movement for reasons other than their own class situation, have a quite

specific function because of their greater distance to things. I must decidedly reject being labelled an idealist who knows nothing about the world and who hasn't got a clue about the 'thoughts and feelings of the working class'. Anyway, I don't know what my biographical development and my existent or non-existent knowledge of the psyche of the workers have to do with my monograph, and I am also unclear as to the source of your supposedly exact knowledge of my past history. Above all, I must resist your attempt to prescribe the route I and people like me should take, almost the series of tests we must pass in order to be accepted by the movement to which we feel we belong in an integral way. If someone does not like the results of my work, he has the right to criticise it, just as I reserve the right to criticise those who criticise me. It is a new thing for me, however, that activity within and for the labour movement virtually presupposes a series of tests, and that anyone who is a part of the movement should submit all written statements to a kind of pre-censorship. Your invitation to withdraw the manuscript, whose conclusions I still regard as justified, is therefore surely not to be taken literally.

I come now to the detailed points in your letter. The aim of my work was, as I said in the introduction, to portray the overall tendency of the decisions of the *Reich* Labour Court and to compare them with fascist ideology, not with fascist reality. It is true that Italian labour law is a product of political dictatorship, but this in turn arose from a specific social and economic situation.

If it is a fact that the practice of the *RAG* in Germany is, consciously or unconsciously, captive to the same or similar tendencies as the dictatorial regime in Italy, then I am simply pointing to a danger inherent in the inner transformation of labour law by judicial decisions. It is evident that things which have been brought about by political dictatorship in one country can be achieved in another country by independent judge-made law still operating within a democracy. The aim of my monograph is to show this. It is a mystery to me why I should have looked at Russia. I could not do this because I cannot read Russian (I can read Italian), and the treatment of a foreign legal system in any seriousness is naturally only possible if one can read the sources in the original. Your tacit implication that I wanted to avoid criticising Russia is wrong; I do not sympathise with communism, I have never done so, and I have never been a communist. On the other hand, I believe myself, for this very reason, to be free of rabid anti-communism (*Kommunistenfresserei*). It is also a mystery to me why I should have made special reference to the obvious fact that things can develop in the future in Germany in a number of different directions. Unlike you, I regard such comparisons as necessary, and I am also of the opinion

that, in making comparisons, one can and must leave out details in order to bring out clearly points of comparison. If you call that 'overstatement', then I regard such overstatements in certain circumstances as necessary and apposite.

As for my position on the system of arbitration, I am naturally aware that the 'intervention theory' of the *RAG* is regarded by many people as correct. Now as before, however, I regard it as irreconcilable with clause 6 of the Arbitration Decree (*SchlVO*), and I believe that it is based on a misunderstanding of the essence of arbitration. For, in contradiction to clause 3, the *RAG* sees arbitration primarily in terms of the avoidance and settlement of disputes and not the creation of law. As far as I know, it was the conscious intention when the Decree was drafted to give arbitration a law-creating character and to dissociate it from its connection with the concept of the 'general dispute' (*Gesamtstreitigkeit*). I also believe that this corresponds more to the present interests of the working class. I have never maintained that the arbitration system should function as an aid to industrial conflict, as you say on page 2 of your letter. I have only said that arbitration is an aid to the creation of collective conditions of employment, irrespective of whether these conditions are, in any concrete case, the subject of a general dispute.

The 'details' you criticise on page 4 of your letter are partly a result of the fact that I naturally had to stop at a certain date and could only partly take later decisions into account. I accept that my comments on the renunciation of collectively agreed wage rates (but not those on the works risk) are partly out-of-date due to subsequent decisions which I have not built in to the text. However, I cannot accept the rest of your points. As far as holidays are concerned, the basic approach of the *RAG* cannot be affected by the special case of the miners, which can be traced perhaps to specific provisions in a collective agreement, nor by the treatment of holidays in the case of short-time workers. The basic emotional tendency of the *RAG* is expressed in the decisions on severely disabled workers and on dismissals, even if the *RAG* has limited their practical effect by recognising the revocability of the right of the severely disabled to payment of wages and by its decisions on short-time workers. Despite your objections, the general tendency, which was my sole concern and which is predominantly determined by the idea of welfare provision for the individual employee, is indisputable. I also do not believe that the employers will be able to argue, by reference to my study, that the decisions of the *RAG* are in general favourable to employees. The first parts of the study would surely prevent the employers from citing my work in support of such an argument.

Finally, I would like to stress again that I believe my work to be a

methodologically novel attempt at analysis. One can naturally criticise my overall method, one can criticise details as well. But it is impossible to stop someone saying something because he approaches things in an unusual way and brings in new perspectives. Apart from the fact that this is pointless, it also contradicts the idea of intellectual freedom, which I had always believed to be fundamental to the labour movement.

The purpose of your unusual step of sending a copy of your letter to various comrades is incomprehensible to me. Naturally, I now, for my part, am sending copies of my letter to the same comrades.

With party greeting,
I remain
Kahn-Freund

Glossary

ADB (Allgemeiner Deutscher Beamtenbund)	General Federation of German Civil Servants. Founded in 1922, it was the socialist trade union confederation for civil servants (*Beamte*, q.v.).
ADGB (Allgemeiner Deutscher Gewerkschaftsbund)	General Federation of German Trade Unions. Founded in 1919, it was the socialist trade union confederation for manual workers (*Arbeiter*, q.v.).
AfA-Bund (Allgemeiner freier Angestelltenbund)	General Free Federation of Salaried Employees. Founded in 1921, it was the socialist trade union confederation for salaried employees (*Angestellte*, q.v.).
Allgemeinverbindlich(keits)-erklärung	The 'extension' of a collective agreement, i.e. the legal extension of collectively negotiated terms of employment to employees in the same occupations who are not otherwise covered by the agreement.
Amt	A specific post or 'office' usually held by a public servant (*Beamter*, q.v.). According to Max Weber, the existence of a clearly defined 'office' is one of the key features of bureaucracy.
Amtsgerichtsrat	A junior judge in the state judicial service. This was Kahn-Freund's title between 1929 and 1933.
Angestellter	Salaried employee, 'white-collar worker', ranging from routine office and shop work to supervisory and executive management. One of the three main categories of employee (q.v. *Arbeiter, Beamter*)

recognised under German employment law.

Annahmeverzug — The promisee's failure or refusal to accept performance of the contract. Under section 615 of the Civil Code (*BGB*, q.v.), an employee had the right to payment of wages if the employer was held to have failed or refused to accept the employee's performance of the contract (q.v. *Unmöglichkeit*).

Arbeit — Work or labour. Central concept for Marx and for Sinzheimer (q.v. *Arbeitsrecht*).

Arbeiter — Manual worker. Includes unskilled and semi-skilled labourers, skilled craftsmen, porters and domestic servants. One of the three main categories of employee under German employment law. Defined in the Law of Works Councils (1920) as an employee who is not an *Angestellter* (q.v.).

Arbeiterkammer — Chamber of Labour. The Chamber of Labour in the town of Bremen, which was one of the constituent states of the German *Reich*, was established by regional state law as a kind of 'parliament of labour' to represent the interests of employees (the 'producers') vis-à-vis the regional state government.

Arbeiterräte — Workers' councils. Under Paragraph 165 of the Weimar Constitution, workers' councils were to be established at establishment, district and national levels. Eventually, only establishment workers' councils (*Betriebsarbeiterräte*, q.v.) or works councils (*Betriebsräte*, q.v.) survived.

Arbeiter- und Angestelltenausschüsse — Workers' and salaried employees' committees. The forerunners of the works councils (*Betriebsräte*) and 'group councils' (*Gruppenräte*, q.v.). (See also Appendix 2, *BRG*).

Arbeitsgericht — Labour tribunal. The 'unified' system of labour tribunals in Weimar Germany

(from 1 January 1927) had three appellate stages, with the *Reichsarbeitsgericht* (q.v.) at the apex (see Appendix 2, *AGG*).

Arbeitsrecht — Labour law, law of 'dependent' labour. Used by Sinzheimer to describe those rules and statutes developed by the state and the trade unions to counteract the inequality of bargaining power inherent in the employment relationship.

Beamter — Public servant, state official, 'career' civil servant. One of the three main categories of employee (q.v. *Angestellter*, *Arbeiter*) under German employment law (q.v. *Amt*).

Beruf — Occupation, trade. The 'supra-plant' level at which collective bargaining was conducted (q.v. *berufliche Auseinandersetzungen*).

Berufliche Auseinandersetzungen — Occupational conflicts. Refers to collective conflicts between trade unions and employers' associations, which transcend a particular establishment or company (q.v. *Beruf*, *Betrieb*).

Berufsstände/ Berufsständische Idee — See *Stand*.

Betrieb — Works, establishment, plant. Legal entity with system of industrial relations distinct from that at the occupational level (q.v. *Beruf*). See also *Betriebsrat*, *Betriebsvereinbarung*, *Betriebsverfassung*, *Betriebsversammlung* (q.v.).

Betriebsarbeiterrat — Establishment workers' council, i.e. 'works council' (q.v. *Betriebsrat*). See also *Arbeiterräte* (q.v.).

Betriebsrat — Works council or works councillor. Institution or person representing all employees (*Arbeiter* and *Angestellte*) in a particular works or establishment. Given full legal recognition in the Law of Works Councils (1920) (see Appendix 2, *BRG*).

Betriebsvereinbarung — Works agreement between works council

(*Betriebsrat*, q.v.) and works management. Distinct from collective agreement (*Tarifvertrag*, q.v.), which can only be negotiated by trade unions and employers' associations at occupational level (q.v. *Beruf*).

Betriebsverfassung — Literally 'works constitution'. This denotes the 'constitutional' and legal framework of labour relations at works level, the system of obligations and rights operative in all plants (q.v. *Betrieb*) over a certain size.

Betriebsversammlung — Works meeting. A statutory meeting of all employees to be held at regular intervals in working time.

Freirechtliche Bewegung — The 'free law movement' developed at the beginning of the twentieth century to give more freedom to the judges to shape the law, as against their traditional role as mere interpreters of codes and statutes. Its leading figure was Ernst Fuchs.

Friedenspflicht — Peace obligation. The obligation of the parties to a collective agreement to maintain economic peace for the duration of the agreement. There was a major legal debate in the Weimar period as to whether this obligation was 'relative' or 'absolute'. (q.v. *Relativität der tarifrechtlichen Friedenspflicht*).

Geltendes Recht — Law in force as a norm, translated in the text as 'formal' law. In his essay on Sinzheimer, Kahn-Freund distinguishes between 'socially effective' or 'real' (*wirkend*, q.v.) law, 'formal' (*geltend*) law, 'just' (*richtig*, q.v.) law and 'living' (*lebend*, q.v.) law.

Gemeinwohl — A direct German translation of the Latin 'salus publica' or 'common wealth'. Might be translated as public welfare or common weal.

Genossenschaftsverband — Organisation of fellowship, co-operative

association. The distinction between this and an organisation of domination or compulsory association (*Herrschaftsverband*, q.v.) was central to Otto Gierke's study of the German Law of Associations (*Das deutsche Genossenschaftsrecht*) of 1868ff.

Gesamtinteressen — Overall or general interests. Refers normally to the general interests of employers and employees which transcend a particular plant or company (q.v. *Gesamtstreitigkeit*, *Gesamtvereinbarung*).

Gesamtstreitigkeit — Overall or general dispute. Normally a dispute between a trade union and an employers' association. In conflicts of interests, the *RAG* wished to restrict the use of arbitration to cases where there was an 'overall dispute', thus stressing the dispute-avoiding function of arbitration. It anyway had jurisdiction over conflicts of rights.

Gesamtvereinbarung — Overall or general agreement. Normally an agreement between a trade union and an employers' association, that is, a collective agreement (*Tarifvertrag*, q.v.).

Gesetz — Written or statute law (q.v. *Recht*).

Gesinnung — Conviction, ultimate ends or values. Achieved some prominence in 1918 in Max Weber's lecture 'Politics as Vocation' in which he contrasted the 'ethic of conviction' (*Gesinnungsethik*) with the 'ethic of responsibility' (*Verantwortungsethik*).

Gewaltrecht — Literally 'law of force', law of subordination. Sinzheimer saw the contract of employment as a combination of two types of law: it was a contract between 'equals' with mutual obligations (the law of obligations or *Schuldrecht*, q.v.) and a mask for the subordination of labour (the law of subordination, or 'law of force'). Sometimes he referred to the element of subordination in the manner of Gierke as

	the 'status' element (literally the 'law of persons' or *Personenrecht*, q.v.).
Gewerbe- und Kaufmannsgerichte	Industrial and commercial tribunals (cf. Appendix 2, *GewGG*, *KGG*). Unified tribunals were only created by the Law of Labour Tribunals of 1926 (see Appendix 2, *AGG*).
Gewerbliche Arbeiter	Manual workers in industry and handicrafts. Until the Weimar Republic, their employment rights and obligations were largely contained in the Industrial Code (*Gewerbeordnung*) of 1869 (see Appendix 2).
Gewerkschaftliche Vertrauensleute	Trade union representatives at the workplace, literally 'trade union trust-men'. The nearest equivalent to the British shop steward, although the German trade union workplace representative was and is not the main legally recognised employee representative at plant level; this is the works councillor (*Betriebsrat*, q.v.).
Gruppenrat	Group council. These were the separate representative bodies for manual workers (*Arbeiter*, q.v.) and salaried employees (*Angestellte*, q.v.) at works level. It was these separate councils, and not the unified works council (*Betriebsrat*, q.v.), which had rights of consultation and appeal on dismissals and redundancies.
Herrschaftsverband	Organisation of domination or compulsory association (q.v. *Genossenschaftsverband*).
Das Höchste Gericht	The Highest Court. Used by Kahn-Freund to denote the *Reichsarbeitgericht* (q.v.), the highest appellate labour tribunal, and the *Reich* Court, the Supreme Court in Weimar Germany. Prior to the establishment of the *RAG* in 1927, and even subsequently, the *Reich* Court made decisions which directly affected labour law and labour relations. (Cf. Appendix 2, *AGG*).
Koalitionsrecht	Literally right(s) or law of association or

combination. In fact, this can mean (i) 'freedom of association', i.e. the right to form and join a trade union, (ii) 'trade union law' (as a legal discipline) (iii) 'the rights of a trade union' (e.g. the right to be consulted).

Korporativ — Literally 'corporate'. As used by Sinzheimer it often means 'collective', e.g. in the title of his first book, *Der korporative Arbeitsnormenvertrag* (*The Collective Agreement*), or in his article on 'corporatieve Gedachten' ('the collective idea') of 1936.

Land/Länder — Regional state (government). In 1871, the German *Reich* was created out of a federation of twenty-five constituent *Länder*, including Prussia (the largest and most powerful), Baden, Bavaria, Saxony, Thuringia, Württemberg and the two 'town states' of Bremen and Hamburg. In the Weimar period, each state retained its own regional state government with responsibility for education, justice, social welfare and the police. In practice, however, national (*Reich*) government policy usually took priority over that of the *Länder*.

Lebendes Recht — Living law. This concept was initially developed by Eugen Ehrlich before the First World War to denote 'socially effective' law, i.e. law created autonomously and spontaneously by society as well as legal provisions enacted by the state.

Manteltarif(vertrag) — 'Framework agreement.' A collective agreement between an employers' association and a trade union, covering general terms and conditions of employment but not the actual hourly wage rates etc.

Personenrecht — Literally law of persons. This term refers to the conceptualisation of the contract of employment as a personal relation of

obedience and protection, in other words the employee obeys the employer in return for extensive social protection (q.v. *Gewaltrecht*, *Schuldrecht*).

Prestigepolitik 'Policy of prestige.' This denotes a show of power for its own sake as opposed to a 'policy of interest', the use of power as a means to a particular end. The distinction stems originally from Bismarck.

Räte Councils. The German term *Räte* was also the translation of the Russian term 'soviet'. Thus, discussions of the role of the *Räte* in the 1917–20 period had strong overtones relating to the events in Russia during and after the October Revolution of 1917.

Rätediktatur Dictatorship of the councils or 'soviet dictatorship' (see *Räte*, q.v.). This doctrine was espoused both by syndicalists and communists in the 1918–20 period in Germany.

Rätesystem System of councils or councils' system. The term gradually came to refer just to the councils at plant level (the works councils or *Betriebsräte*, q.v.), but under the 'economic constitution' (*Wirtschaftsverfassung*, q.v.) of 1919, it referred to a comprehensive system of self-governing institutions, including local, district and national workers' councils (*Arbeiterräte*, q.v.) and bipartite economic councils (*Wirtschaftsräte*, q.v.).

Recht Law or right. Wider than written or statute law (q.v. *Gesetz*), this term covers all the rules of behaviour which have normative force as law, in other words it includes judicial and administrative rules and laws based on custom.

Rechtsprechung The administration of justice; the practice of a court or judicial practice; the decisions, judgments or case law of a court.

Reich Realm or empire, usually left in the original

German. Often used as a synonym for the state or national government.

Reichsarbeitsgericht — *Reich* Labour Court. This was the highest appellate stage in the 'unified' system of labour tribunals in Weimar Germany. Translated as Court rather than tribunal because it was composed of a majority of professional judges.

Reichsgericht — *Reich* Court (q.v. *Das Höchste Gericht*).

Reichstag — National German parliament, also the building in Berlin in which the parliament met.

Reichswirtschaftsrat — National (or *Reich*) Economic Council (q.v. *Wirtschaftsräte, Rätewesen*).

Relativität der tarifrechtlichen Friedenspflicht — The relativity of the peace obligation arising from a collective agreement. This means that the obligation of the parties to a collective agreement to maintain economic peace (*Friedenspflicht*, q.v.) for the duration of the agreement is only a 'relative' obligation. It applies therefore in principle only to conflicts of rights, not conflicts of interests. Industrial action in pursuit of demands not covered by the agreement is thus permitted.

Richtiges Recht — 'Just law'. The term came from Stammler, whose book entitled *The Theory of Just Law* was first published in 1902. Ultimately the term comes from Aristotle's *Nichomachean Ethics*, Book 5 (q.v. *geltendes Recht*).

Schuldrecht — Literally law of obligations. It refers here to the legal interpretation of the contract of employment as a contract between equals, as a pure act of exchange (q.v. *Gewaltrecht, Personenrecht*).

Sozialisierung — Socialisation (of the economy). The demand of the German labour movement for the socialisation of the economy in the period 1918–20 not only involved the transference of key industries into state ownership (i.e. nationalisation or

Verstaatlichung), but also the democratisation of relations in industry (some kind or 'workers' control') and the transition to a totally new kind of society (socialism). The term must not be confused with 'socialization', which is a socio-cultural concept referring to the process whereby human beings (and especially children) are 'educated' into the norms and values of a particular society or social grouping.

Sozialpolitik Social policy. In Britain, the term refers traditionally to state policy and legislation concerned with social insurance and social welfare for the individual. In Weimar Germany, it was used in a much wider sense to cover state *and* non-state policies, rules and practices; social welfare protection *and* social and legal rights; protection and rights for individuals *and* corporate bodies (such as trade unions).

Stand Status, occupational status group (*Berufsstand*). As a sociological category, *Stand* refers to social stratification based on status and life-style rather than on objective economic 'class situation'. As a form of social and political government, the idea that 'estates' or 'status groups' should participate in the determination of state policy goes back to the medieval guilds and the *Ständestaat* (q.v.). The idea that occupational status groups (through trade unions, workers' councils and employers' associations) should be given decision-making power over economic policy (*die berufsständische Idee*) was advanced by various socialist groups in 1918–19. Later, fascist organisations took over the idea that occupational status groups (redefined as state-licensed 'corporations') should play a central role in the new 'corporate' state.

Ständestaat Literally the 'polity of the Estates'. A

system of rule in feudal times in which there were two recognised centres of power, the feudal ruler and the autonomous urban estates, which claimed distinct corporate rights vis-à-vis the territorial lord or prince. Gierke saw the pure system of feudal rule as based on domination, while the *Ständestaat* was based on fellowship (*Genossenschaft*, q.v.).

Tarifrecht Law of collective bargaining or collective agreements. Framework for labour relations at occupational level (q.v. *Beruf*).

Tarifvertrag Collective agreement between an employers' association and a trade union. The legal framework of the collective agreement was and is totally distinct from that of works agreements (*Betriebsvereinbarungen*, q.v.) made at plant level by company managements and works councils (q.v. *Betriebsräte*).

Unabdingbarkeit Literally unalterability, irrevocability, here the principle of the automatic compulsory effect of collective agreements (*Tarifverträge*, q.v.). This meant that an employer who was party to a collective agreement could not legally contract out of its terms through the individual contract of employment to the detriment of the employee. Employers who were not party to a collective agreement were not 'automatically' bound to accept its terms, but could be compelled to do so by having the 'compulsory effect' 'extended' to them (*Allgemeinverbindlicherklärung*, q.v.), usually by the Minister of Labour.

Unmöglichkeit der Leistung The impossibility of performance of the contract. Under section 323 of the Civil Code (*BGB*, q.v.), the employee had no right to payment of wages if the employer was held to have been unable to perform the contract because of circumstances beyond his control (q.v. *Annahmeverzug*).

Verbindlicherklärung Order imposing compulsory effect. Usually

connected with compulsory imposition of an award by the arbitration authorities (see Appendix 2, *SchlVO*).

Wirkendes/Wirkliches Recht Socially effective or real law. This was contrasted by Sinzheimer with formal law (*geltendes Recht*, q.v.).

Wirtschaftliche Vereinigung Literally 'economic association'. This concept was the subject of permanent political and jurisprudential controversy during the Weimar Republic. It was the 'economic associations' rather than the trade unions and employers' associations who were named as the parties to collective agreements in the Decree of 23 December 1918 (see Appendix 2, *TVV*).

Wirtschaftsdemokratie Economic democracy. This was the title of a book of essays published in 1928, which had been commissioned by the *ADGB* (q.v.). It represented a programmatic statement of socialist trade union ideology of the period.

Wirtschaftsräte Economic councils. Article 165 of the Weimar Constitution envisaged the establishment of economic councils at district and national (*Reichswirtschaftsrat*, q.v.) level. They were to be composed of worker and employer representatives and other participants, and were supposed to exert a strong influence on national economic policy. This so-called 'economic constitution' (*Wirtschaftsverfassung*, q.v.) remained a dead letter (see Appendix 2, *BRG*, *RV*, Appendix 3, Article 165).

Wirtschaftsrecht Economic law. Sinzheimer envisaged that labour law would eventually be superseded by 'economic law', under which private ownership of the means of production would be abolished and the individual, social and economic spheres would merge.

Wirtschaftsverfassung Economic constitution. The system of workers' and economic councils (*Arbeiterräte*, *Wirtschaftsräte*, q.v.) envisaged under

Article 165 of the Weimar Constitution (see Appendix 2, *BRG*, *RV*, Appendix 3, Article 165) (q.v. *Rätewesen*).

Bibliography

Abendroth, W. 1972. *A Short History of the European Working Class*. London

–. 1976. *Ein Leben in der Arbeiterbewegung*. Frankfurt am Main

Bahne, S. 1965. ' "Sozialfaschismus" in Deutschland. Zur Geschichte eines politischen Begriffs'. *International Review of Social History*. X (Part 2) 211–45

Bracher, K.D. 1955. *Die Auflösung der Weimarer Republik*. Villingen

–. 1966. 'Introduction'. *Politische Justiz 1918–1933*. Eds. H. Hannover and E. Hannover. Frankfurt am Main and Hamburg

–. 1971. *The German Dictatorship*. London

Brady, R. 1937. *The Spirit and Structure of German Fascism*. London

Braunthal, G. 1978. *Socialist Labor and Politics in Weimar Germany*. Hamden/Connecticut

Bullock Report. 1977. Report of the Committee of Inquiry on Industrial Democracy. Cmnd. 6706. London

Carroll, L. 1865. *Alice's Adventures in Wonderland*. London

Cole, G.D.H. 1913. *The World of Labour*. London

–. 1917. *Self-Government in Industry*. London

Crouch, C. 1977. *Class Conflict and the Industrial Relations Crisis*. London

Däubler, W. 1975. *Das soziale Ideal des Bundesarbeitsgerichts*. Frankfurt am Main and Cologne

–. 1976. *Das Arbeitsrecht*. Reinbek bei Hamburg

–. 1979. *Das Arbeitsrecht 2*. Reinbek bei Hamburg

Davies, P.L., and M.R. Freedland. 1979. *Labour Law: Text and Materials*. London

– and Lord Wedderburn. 1977. 'The Land of Industrial Democracy'. *Industrial Law Journal*. VI. 197–211

Donovan Report. 1968. Report of the Royal Commission on Trade Unions and Employers' Associations 1965–8. Cmnd. 3623. London

Drechsler, H. 1971. *Die Sozialistische Arbeiterpartei Deutschlands* (SAPD). Erlangen

Ehrlich, E. 1962. *Fundamental Principles of the Sociology of Law*. New York

Eyck, E. 1967. *A History of the Weimar Republic*. 2 Vols. New York
Flanders, A. 1968. 'Collective Bargaining. A Theoretical Analysis'. *British Journal of Industrial Relations*. VI. 1–26
–. 1970. *Management and Unions*. London
–. 1974. 'The Tradition of Voluntarism'. *British Journal of Industrial Relations*. XII. 352–70
– and H. Clegg (eds.). 1954. *The System of Industrial Relations in Great Britain*. Oxford
Flatow, G., and O. Kahn-Freund. 1931. *Betriebsrätegesetz vom 4 Februar 1920*. 13th edition. Berlin
Flechtheim, O.K. 1969. *Die KPD in der Weimarer Republik*. Frankfurt am Main
Fox, A. 1975. 'Collective Bargaining, Flanders and the Webbs'. *British Journal of Industrial Relations*. XIII. 151–74
Fraenkel, E. 1929. 'Kollektive Demokratie'. *Die Gesellschaft*. VI. 103–18. Reprinted in Ramm (1966), pp. 79–95
–. 1930. 'Zehn Jahre Betriebsrätegesetz'. *Die Gesellschaft*. VII. 117–29. Reprinted in Ramm (1966), pp. 97–112
–. 1932. 'Die politische Bedeutung des Arbeitsrechts'. *Die Gesellschaft*. IX. 36–48. Reprinted in Ramm (1966). pp. 247–60
–. 1941. *The Dual State: A Contribution to the Theory of Dictatorship*. New York
Fricke, D. 1962. *Zur Organisation und Tätigkeit der deutschen Arbeiterbewegung 1890–1914*. Leipzig
Fülberth, G., and J. Harrer. 1974. *Die deutsche Sozialdemokratie 1890–1933*. Darmstadt and Neuwied
Gamillscheg, F., J. de Givry, B. Hepple and J.-M. Verdier (eds.). 1980. *In Memoriam Sir Otto Kahn-Freund*. Münich
Gierke, O. 1868. *Das deutsche Genossenschaftsrecht*. Vol. 1
–. 1900. *Political Theories of the Middle Age*. Trsl. by F.W. Maitland. Cambridge
–. 1950. *Natural Law and the Theory of Society 1500 to 1800*. Trsl. by E. Barker. Cambridge
Ginsberg, M. (ed.). 1959. *Law and Opinion in England in the 20th Century*. London
Hannover, H., and E. Hannover (eds.). 1966. *Politische Justiz 1918–1933*. Frankfurt am Main and Hamburg
Hepple, B.A. 1979. 'Sir Otto Kahn-Freund, Q.C., F.B.A. 1900–1979'. *Industrial Law Journal*. VIII. 193–6
–. 1980. 'In Memoriam Otto Kahn-Freund'. *In Memoriam Sir Otto Kahn-Freund*. Ed. F. Gamillscheg *et al.* Münich
Hueck, A. and H.C. Nipperdey. 1931 and 1930. *Lehrbuch des Arbeitsrechts*. Vol. 1 (3rd ed.) and Vol. 2. Mannheim
Hugo Sinzheimer – Gedächtnisveranstaltung zum 100. Geburtstag. 1977. Frankfurt am Main
Hunt, R. 1970. *German Social Democracy 1918–1933*. Chicago

Industrial Democracy. 1978. White Paper. Cmnd. 7231. London
Jacobi, E. 1927. *Grundlehren des Arbeitsrechts*. Leipzig
Kahn-Freund, O. 1928. *Umfang der normativen Wirkung des Tarifvertrages und Wiedereinstellungsklausel*. Berlin
–. 1931. *Das soziale Ideal des Reichsarbeitsgerichts. Eine kritische Untersuchung zur Rechtsprechung des Reichsarbeitsgerichts*. Mannheim-Berlin-Leipzig. Reprinted in Ramm (1966)
–. 1932. 'Der Funktionswandel des Arbeitsrechts'. *Archiv für Sozialwissenschaft*. LXVII. Reprinted in Ramm (1966)
–. 1943. Collective Agreements under War Legislation'. *Modern Law Review*. VI. 112–43
–. 1944. 'The Weimar Constitution'. *Political Quarterly*. XV. 229–35
–. 1949. 'Introduction' Karl Renner. *The Institutions of Private Law and Their Social Functions*. Ed. (and Notes) O. Kahn-Freund. Trsl. by A. Schwarzschild. London, pp. 1–43
–. 1951. 'Note on *Cassidy* v *Minister of Health*'. *Modern Law Review*. XIV. 504–9
–. 1954. 'Intergroup Conflicts and Their Settlement'. *British Journal of Sociology*. V. 193–227
–. 'Legal Framework'. *The System of Industrial Relations in Great Britain*. Ed. A. Flanders and H. Clegg. Oxford, pp. 42–127
–. 1959. 'Labour Law'. *Law and Opinion in England in the 20th Century*. Ed. M. Ginsberg. London, pp. 215–63
–. 1960. 'Labour Law and Social Security'. *American Enterprise in the European Common Market*. Eds. E. Stein and T. Nicholson. Vol. 1. Michigan, pp. 297–458
–. 1965. 'Introduction'. *Labour Relations and the Law – A Comparative Study*. Ed. O. Kahn-Freund. London
–. 1968. *Labour Law: Old Traditions and New Developments*. Toronto
–. 1972. *Labour and the Law*. 1st edition. London
–. 1974. 'On Uses and Misuses of Comparative Law'. *Modern Law Review*. XXXVII. 1–27
–. 1975. *Law and Labour – An Ambivalent Relationship*. Joan Woodward Memorial Lecture. London
–. 1976. 'Hugo Sinzheimer 1875–1945'. *Arbeitsrecht und Rechtssoziologie*. Introduction to the collected essays and speeches of Hugo Sinzheimer. Eds. O. Kahn-Freund and T. Ramm. Frankfurt am Main and Cologne
–. 1976. 'The Impact of Constitutions on Labour Law'. *Cambridge Law Journal*. XXXV. 240–71
–. 1977. *Labour and the Law*. 2nd edition. London
–. 1977. 'Industrial Democracy'. *Industrial Law Journal*. VI. 65–84
–. 1978. *Selected Writings*. London
–. 1979. *Labour Relations: Heritage and Adjustment*. Oxford
–. 1979. 'The Study of Labour Law – Some Recollections'. *Industrial Law Journal*. VIII. 197–201
– and B.A. Hepple. 1972. *Laws Against Strikes*. Fabian Pamphlet.

London
Kaskel, W. 1932. *Arbeitsrecht*. 4th edition revised by H. Dersch. Berlin
Korsch, K. 1968. *Arbeitsrecht für Betriebsräte*. Reprint of 1922 edition. Ed. E. Gerlach. Frankfurt am Main
Kraines, O. 1974. *The World and Ideas of Ernst Freund*. Alabama
Kuczynski, J. 1966. *Die Lage der Arbeiterklasse 1917–1933*. Berlin
Lethen, H. 1970. *Neue Sachlichkeit 1924–1932*. Stuttgart
Lewis, R. 1979. 'Collective Agreements: The Kahn-Freund Legacy'. *Modern Law Review*. XLII. 613–22
–. 1979. 'Kahn-Freund and Labour Law: An Outline Critique'. *Industrial Law Journal*. VIII. 202–21
– and J. Clark. 1977. 'The Bullock Report'. *Modern Law Review*. XL. 323–38
– and J. Clark (eds.). 1977. *Ford Shop Stewards on Industrial Democracy*. Nottingham
Loderer, E. 1977. 'Opening Address'. *Hugo Sinzheimer – Gedächtnisveranstaltung zum 100. Geburtstag*. Frankfurt am Main. pp. 19–22
Luthardt, W. (ed.). 1978. *Sozialdemokratische Arbeiterbewegung und Weimarer Republik*. 2 Volumes. Frankfurt am Main
Martiny, M. 1976. *Integration oder Konfrontation? Studien zur Geschichte der sozialdemokratischen Rechts- und Verfassungspolitik*. Bonn-Bad Godesberg
Marx, K. 1847/49. *Wage-Labour and Capital*. Reprinted Berlin 1969
– and F. Engels. 1848. *The Communist Manifesto*. Reprinted in *Karl Marx: Selected Works*. Vol. 1. London. 1942, pp. 189–241
Matthias, E. 1960. 'Die Sozialdemokratische Partei Deutschlands'. *Das Ende der Parteien 1933*. Eds. E. Matthias and R. Morsey. Düsseldorf, pp. 101–62
– and R. Morsey (eds.). 1960. *Das Ende der Parteien 1933*. Düsseldorf
Milatz, A. 1960. 'Das Ende der Parteien im Spiegel der Wahlen 1930 bis 1933'. *Das Ende der Parteien 1933*. Eds. E. Matthias and R. Morsey. Düsseldorf, pp. 743–93
Milne-Bailey, W. 1934. *Trade Unions and the State*. London
Mommsen, H., D. Petzina and B. Weisbrod (eds.). 1977. *Industrielles System und Politische Entwicklung in der Weimarer Republik*. Volume 2. Düsseldorf
Neumann, F. 1929. *Die politische und soziale Bedeutung der arbeitsgerichtlichen Rechtsprechung*. Berlin. Reprinted in Ramm (1966), pp. 113–47
–. 1942. *Behemoth*. London
Nolte, E. 1965. *Three Faces of Fascism*. London
Partington, T.M. 1978. 'Introduction'. *O. Kahn-Freund: Selected Writings*. London, pp. ix–xv
Pascal, R. 1946. *The Growth of Modern Germany*. London
Phelps Brown, E.H. 1959. *The Growth of British Industrial Relations*. London
Pimlott, B. 1977. *Labour and the Left in the 1930s*. Cambridge

Preller, L. 1978. *Sozialpolitik in der Weimarer Republik*. Düsseldorf
Ramm, T. 1965. 'The German Law of Collective Agreements'. *Labour Relations and the Law: A Comparative Study*. Ed. O. Kahn-Freund. London, pp. 84–91
–. 1965. 'The Restriction of the Freedom to Strike in the Federal Republic of Germany'. *Labour Relations and the Law: A Comparative Study*. Ed. O. Kahn-Freund. London, pp. 201–10
– (ed.). 1966. *Arbeitsrecht und Politik*. Neuwied
–. 1971. 'German Labour Law and Otto Kahn-Freund'. *Industrial Law Society Bulletin*. No. 11, pp. 4–7
–. 1971. 'Labour Courts and Grievance Settlement in West Germany'. *Labour Courts and Grievance Settlement in Western Europe*. Ed. B. Aaron. Berkeley/California, pp. 83–157
–. 1975. 'Labour Relations in the Public Sector of the Federal Republic of Germany: The Civil Servant's Role'. *Public Employment Labor Relations. An Overview of Eleven Nations*. Ed. C.M. Rehmus. Michigan, pp. 101–24
–. 1980. 'Otto Kahn-Freund und Deutschland'. *In Memoriam Sir Otto Kahn-Freund*. Eds. F. Gamillscheg *et al.* Münich, pp. XXI–XXXII
–. 1980. 'Die Arbeitsverfassung der Weimarer Republik'. *In Memoriam Sir Otto Kahn-Freund*. Eds. F. Gamillscheg *et al.* Münich, pp. 225–46
Reich, W. 1975. *The Mass Psychology of Fascism*. London
Renner, K. 1949. *The Institutions of Private Law and Their Social Functions*. Ed. and Intro. O. Kahn-Freund. Trsl. by A. Schwarzschild. London
Rheinstein, M. (ed.). 1954. *Max Weber on Law in Economy and Society*. Cambridge/Mass.
Rosenberg, A. 1936. *A History of the German Republic*. London
–. 1964. *Imperial Germany – The Birth of the German Republic*. Boston
Rückert, J., and W. Friedrich. 1979. *Betriebliche Arbeiterausschüsse in Deutschland, Großbritannien und Frankreich im späten 19. und frühen 20. Jahrhundert*. Frankfurt am Main
Saul, K. 1974. *Staat, Industrie und Arbeiterbewegung im Kaiserreich*. Hamburg
Schneider, M. 1978. 'Tolerierung – Opposition – Auflösung. Die Stellung des ADGB zu den Regierungen Brüning bis Hitler'. *Sozialdemokratische Arbeiterbewegung und Weimarer Republik*. Ed. W. Luthardt. Vol. 1. Frankfurt am Main, pp. 150–67
Schorske, C. 1955. *German Social Democracy 1905–1917*. Cambridge/Mass.
Simitis, S. 1977. 'Introduction'. *Hugo Sinzheimer – Gedächtnisveranstaltung zum 100. Geburtstag*. Frankfurt am Main, pp. 9–15
– 1979. 'Otto Kahn-Freund'. *Arbeit und Recht*. XXVII. 369–70
Sinzheimer, H. See Appendix 1 for an extended bibliography of Sinzheimer's main publications.
Webb, S. and B. Webb. 1894. *The History of Trade Unionism*. London

–. and B. Webb. 1897. *Industrial Democracy*. London

Weber, M. 1947. *The Theory of Social and Economic Organization*. Ed. and Intro. T. Parsons. Trsl. by A.M. Henderson and T. Parsons. London and New York

–. *Sociology of Law*. See Rheinstein, M. (ed.) 1954

Wedderburn, K.W. 1966. *British Report to the 6th International Congress of Labour Law and Social Security*. Stockholm

–. 1971. 'British Labour Law and Otto Kahn-Freund: 1971'. *Industrial Law Society Bulletin*. No. 11, pp. 2–3

–. 1979. 'Professor Sir Otto Kahn-Freund'. *Modern Law Review*. XLII. 609–12

–. 1980. 'Industrial Relations and the Courts'. *Industrial Law Journal*. IX. 65–94

–. 1981. Otto Kahn-Freund and British Labour Law'. 6th Sinzheimer Memorial Lecture. Frankfurt am Main (forthcoming)

Index